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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the pendency of a proposed class action tolls the running of the ninety-day statute of limitations (under 42 U.S.C. § 2000e-5(f)(1) (1972)) for purposes of allowing Respondent (a putative class member) to file a separate, private Title VII action after certification of the putative class has been denied.

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CROWN, CORK & SEAL COMPANY, INC.,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Crown, Cork & Seal Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 23, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported in 677 F.2d 391. The opinion of the United States District Court for the District of Maryland is reported in 514 F. Supp. 122. Both opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISION AND RULE INVOLVED

United States Code, Title 42, § 2000e-5(f)(1) (1976); (See p. 17a of Appendix hereto).

Federal Rules of Civil Procedure 23; (See p. 18a of Appendix hereto).

STATEMENT OF THE CASE

Respondent Parker, a black man, was discharged from his employment with Petitioner Crown, Cork & Seal Company, Inc. (hereafter "Crown") on July 15, 1977. On October 3, 1977, Respondent filed a charge of discrimination with the EEOC alleging racially discriminatory harassment and discharge by Crown. In a letter dated November 9, 1978 the EEOC issued a determination that there was no probable cause to believe that Respondent's charge of discrimination against Petitioner was true and issued to Respondent Parker a "Notice of Right to Sue." Mr. Parker received that "Notice of Right to Sue," but did not file suit within the statutorily prescribed period.

On September 15, 1978, Mr. Pendleton and Mr. Allen filed a Title VII class action in the United States District

Court for the District of Maryland, *Pendleton, et al v. Crown, Cork & Seal Co., Inc.*, Civil No. M-78-1734 (D. Md.), on their own behalf, and on behalf of all similarly situated black persons, alleging racial discrimination by petitioner in various employment practices, including harassment and discharge. On May 31, 1979 plaintiffs moved to certify a class, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, consisting of all black persons who were terminated by petitioner on or after January 12, 1973 and all black persons who were hired by petitioner on or after March 31, 1973. By a Memorandum and Order dated September 4, 1980, and after an evidentiary hearing, the District Court denied that motion for class certification.

On October 27, 1980 Respondent Parker filed the present Title VII action in the United States District Court for the District of Maryland alleging that Crown discriminatorily harassed and discharged him on account of his race. The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, et seq. (general federal question jurisdiction). On November 25, 1980 Crown filed its answer denying Respondent's allegation of discrimination and moved for summary judgment against Respondent Parker. Crown asserted that nearly two years had passed since Respondent received his ninety-day notice to sue, and therefore, Respondent had not satisfied a jurisdictional prerequisite to his present suit. In a Memorandum and Order filed April 20, 1981, the District Court granted Crown's Motion for Summary Judgment. Judgment was entered on April 22, 1981 and Respondent appealed to the United States Court of Appeals for the Fourth Circuit.

On February 26, 1981 a stipulated order of dismissal with prejudice was signed by the District Court as the result of a settlement of the remaining individual claims

of Pendleton and Allen. On March 20, 1981 Appellant Parker filed a Motion, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene in the case of *Pendleton and Allen v. Crown, Cork & Seal Co., Inc.*, Civil No. M-78-1734 (D. Md.), for purposes of filing an appeal of the denial of class certification. The District Court, by a Memorandum and Order dated April 16, 1981, granted Respondent's motion to intervene. Thereafter, on May 14, 1980, Respondent noticed an appeal of the denial of class certification in *Pendleton* to the Court of Appeals for the Fourth Circuit, but later consented to Crown's motion to dismiss that appeal as untimely filed.

In an Opinion dated April 23, 1982, the United States Court of Appeals for the Fourth Circuit reversed the summary judgment granted to Petitioners by the District Court on April 22, 1981, and remanded the case to the District Court for trial. The Fourth Circuit, noting the opposite conclusion reached previously by the Second Circuit, interpreted this Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), to mean that the pendency of a putative class action tolls the running of limitations against members of that putative class for purposes of both intervention *and* the filing of a new private suit.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AS TO THE PROPER INTERPRETATION OF THE AMERICAN PIPE TOLLING DOCTRINE.

In 1974 the Supreme Court addressed the issue of tolling the statute of limitations in an antitrust suit and held that "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to *intervene* after the court has found the suit inappropriate for class action status."

American Pipe & Construction Co. v. Utah, 414 U.S. at 552-53 (emphasis supplied). Subsequently, in *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977) the Court extended the rule enunciated in *American Pipe* for the limited purpose of allowing putative class members to appeal the denial of class certification, regardless of whether a final judgment was rendered. *United Airlines, Inc. v. McDonald*, 432 U.S. at 396. To date, the Supreme Court has neither directly nor indirectly established any further extension of the *American Pipe* tolling doctrine to include putative class members who file private actions after the statute of limitations has expired.

Recognizing the Supreme Court's present position, the Court of Appeals for the Second Circuit directly held that the *American Pipe* tolling doctrine does not extend to the commencement of a new action by a putative class member. *Arneil v. Ramsey*, 550 F.2d 774 (2nd Cir. 1977). In *Arneil v. Ramsey* the court maintained that the rule of *American Pipe* was intended solely for the purpose of allowing members of a putative class to intervene in an action after class status was denied. *Arneil v. Ramsey*, 550 F.2d at 783. One year later, the Second Circuit upheld its prior ruling in *Arneil* and concluded that an extension of the *American Pipe* doctrine to putative "class members who file separate suits after the class action has been terminated and the statute of limitations has expired is completely without merit." *Stull v. Bayard*, 561 F.2d 429, 433 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978).

Contrary to the rulings of the Second Circuit, the Fourth Circuit Court of Appeals has held that "the correct reading of *American Pipe* is that the pendency of a putative class action tolls the running of limitations for members of the putative class both for purposes of intervention and the *filing of a new suit* based upon a cause of action embraced

within the putative class action until certification of the class is denied." (emphasis supplied). See p. 7a of Appendix hereto). In so holding, the Fourth Circuit specifically conceded that its interpretation of *American Pipe* conflicts with that adopted by the Second Circuit. Reasoning that the purpose of any statute of limitations "is to put defendant on notice of a claim with reasonable promptness" (see p. 6a of Appendix hereto), the Fourth Circuit declined to follow the Second Circuit's interpretation of the *American Pipe* tolling doctrine. Instead, the court below maintains that permitting the statute of limitations to be tolled for the purpose of intervention, but not for the purpose of instituting a new suit, "exalt[s] form over substance." (see p. 6a of Appendix hereto).

In *American Pipe & Construction Co. v. Utah*, the Supreme Court noted that if the statute of limitations was not tolled, it "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." 414 U.S. at 553. While the Second Circuit held that tolling the statute of limitations to allow the filing of a new private suit would be contrary to this purpose and "would result in the maintenance of another suit by plaintiffs . . .," *Arneil v. Ramsey*, 550 F.2d at 783, the Fourth Circuit reached the opposite conclusion, stating that if the statute of limitations was not tolled in this circumstance it would "violate the spirit and purpose of class action Rule 23," (see p. 7a n.4 of Appendix hereto), and "encourage the filing of individual suits or interventions by members of the putative class. . . ." (See p. 6a of Appendix hereto).

Thus, the conflict between the Fourth and the Second Circuits is complete.[1] The substantial benefit accorded to

[1] Decisions of the Seventh and Third Circuits in *Sussman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied*, 445 U.S. 942, 100 S. Ct. 1336 (1980), and *In re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3rd Cir. 1980), provide

putative class members under the Fourth Circuit's extension of the tolling doctrine will unquestionably make that Circuit a uniquely hospitable forum for plaintiff class litigants and significantly affect the result of class litigation.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE JUDICIAL ADMINISTRATION OF CASES BROUGHT PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Fourth Circuit's extension of the *American Pipe* tolling doctrine is not limited to claims of discrimination under Title VII; rather it is quite clear that it applies broadly to all class actions under Rule 23 of the Federal Rules of Civil Procedure. Particularly since the Supreme Court has not had the occasion to address itself to the very broad issue involved, there are compelling reasons why some definitive guidelines in the application of tolling the statute of limitations in class actions should now be marked by this Court.

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some general support for the Fourth Circuit's present rule. However, decisions by the District of Columbia and Fifth Circuits in *Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 650 F.2d 342, 346 (C.A.D.C. 1980), *cert. denied*, 452 U.S. 954, 101 S. Ct. 3098 (1981), and *Jefferson v. H. K. Porter Co.*, 648 F.2d 337, 339 (5th Cir. 1981), provide even more support for the Second Circuit's rule. District Court decisions are essentially split on the present issue: *Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979) (tolling); *Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979) (tolling); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978) (tolling); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n.19 (D. Hawaii 1976) (tolling); *Jefferson v. H. K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D. Ala. 1980), *aff'd.* 648 F.2d 337 (5th Cir. 1981) (no tolling); *Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 461 F. Supp. 999, 1012 (D.D.C. 1978), *rev'd on different grounds*, 650 F.2d 342 (C.A.D.C. 1980) (no tolling); *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980) (no tolling); *Sanders v. Faraday Laboratories, Inc.*, 82 F.R.D. 99, 103 (E.D.N.Y. 1979) (no tolling).

(a) *Statutes of Limitation*

Statutory limitation periods are instituted on the theory that "even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792 (1944). Punishing the negligent person who asserts an otherwise meritorious claim ensures "fairness to defendant," *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428, 85 S. Ct. 1050, 1054, 13 L. Ed. 2d 941, 945 (1965), and promotes "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L. Ed. 807, 808 (1879). In respect for these concepts, this Court applies the judicial tolling of statutory limitations only sparingly and, more importantly, only for the benefit of putative class members attempting to further the collective interest of the putative class by intervention or appeal. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) (intervention); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (appeal of denial of class action).

The Fourth Circuit's wholesale and mechanical extension of the *American Pipe* tolling doctrine establishes a major and unprecedented incursion upon legislatively enacted statutes of repose. In *American Pipe*, this Court carefully considered the impact of the doctrine of judicial tolling upon legislatively prescribed statutes of limitation and concluded that federal courts have the power to toll statutes of limitation "under certain circumstances not inconsistent with the legislative purpose." 414 U.S. at 559. The Fourth Circuit's broad extension of the tolling doctrine, however, runs roughshod over all legislatively prescribed statutes of limitations, without any consideration of legislative purpose. Thus, under the Fourth Circuit

rule, a judicial tolling of limitations in derogation of statutory law, is automatically triggered by the mere filing of a lawsuit denominated a class action. At the same time, those benefited by the tolling of limitations depends in large measure upon the draftsmanship of the class action complaint, rather than a consideration of the applicable law or facts. Furthermore, the amount of time from the filing of a class action until denial of certification can realistically entail many months or years.[2]

(b) *Notice to Defendant*

A primary support for this Court's establishment of a tolling rule in *American Pipe* and *United Airlines* is the fact that the defendants in both cases were put on notice of potential class-wide liability by the filing of complaints seeking class relief. *American Pipe & Construction Co. v. Utah*, 414 U.S. at 554-555; *United Airlines, Inc. v. McDonald*, 432 U.S. at 395. In *American Pipe*, this Court stated:

> [w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

414 U.S. at 555. However, where a defendant is not only subject to liability through a class action and/or individual actions by the named class representatives plus intervenors, but is also subject to further liability in *separate private actions* by anyone or all of the putative class members, there is insufficient notice to the class action

[2] The Fourth Circuit rule does not consider that class certification can be denied or that decertification can occur at a late date, after appeal or remand. In addition, the present rule does not address successive or overlapping class actions, which could toll the applicable limitations period for an indefinite period of time.

defendant to justify an equitable tolling of the statute of limitations.

It is well recognized that the discovery and proof of a Title VII class action case, with its emphasis upon statistics and expert opinion, is markedly different from the discovery and proof of an individual action, with its emphasis upon a more limited set of facts and the credibility of lay witnesses. Admittedly, the notice provided to a defendant through the filing of a proposed class action suit should be enough to allow that defendant to make preparations (such as securing experts, collecting and analyzing data) for the defense of a class action as well as a defense against the claims of the named plaintiff. However, such notice is of little value if defendant is subject to separate individual actions for an indeterminate period of time by anyone falling within the parameters of a proposed class. Given such circumstance and the nature of the discovery and proof of individual actions, a defendant will unquestionably be prejudiced by the fact that "evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe & Construction Co. v. Utah*, 414 U.S. at 554. Certainly, a party opposing a putative class action cannot be expected to conduct an investigation of the facts and circumstances of each and every person falling within wide and often arbitrary boundaries set forth in a proposed class action complaint. Thus, an extension of the *American Pipe* tolling doctrine will unfairly prejudice defendants and provide an unjust advantage to plaintiffs who benefit from the tolling rule.

3. THE FOURTH CIRCUIT TOLLING RULE SERIOUSLY ERODES THE EFFECTIVENESS OF RULE 23 AND MULTIPLIES LITIGATION.

In fashioning the tolling rule in *American Pipe*, this Court gave careful consideration to the efficiency and economy of litigation as a principal purpose of Rule 23. *American Pipe & Construction Co. v. Utah*, 414 U.S. at

553. There, a major concern of the Court was avoiding a multiplicity of protective motions for intervention *in the proposed class action* by putative class members apprehensive about the likelihood of success of class certification. Under the Fourth Circuit rule, the threat to judicial efficiency and economy under Rule 23 is far more serious than a multiplicity of protective motions for intervention in the *same proposed class action*. Indeed, a denial of class certification will undoubtedly provoke a multiplicity of independent actions in various forums, each with its full complement of discovery, court proceedings, and potentially inconsistent results. Undoubtedly, there are countless individuals, corporations, and other legal entities throughout the nation who are, or were members of putative classes and who, under the rule below, can file private suits after certification has been denied to their class.

A Rule 23 class action is designed to provide a method for an efficient and final resolution of the common claims of many individuals in a single action. The effectiveness of a class action, in turn, must depend upon the support and interest provided by the members or putative members of the class. Where class certification is denied, the Fourth Circuit's tolling rule will unquestionably encourage putative class members to desert the class and file their own private actions, rather than remain with the class and appeal the denial of class certification. This will be especially true in Title VII cases where limitation periods are very short and generally expire before an appeal of the denial of class certification can be heard. Instead of strengthening and facilitating Rule 23, a broad tolling rule for the benefit of private actions will actually foster defections from the putative class, particularly by the more active and informed members. Thus, a judicial commitment to the broad intent and purpose of Rule 23 can only be undermined and disserved by authorizing the Fourth Circuit's extension of the *American Pipe* tolling doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

Theodore Parker,

Appellant,

v.

Crown, Cork and Seal Company, Inc.,

Appellee.

No. 81-1465.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 7, 1981.

Decided April 23, 1982.

Discharged black employee appealed from a summary judgment of the United States District Court for the District of Maryland, James R. Miller, Jr., J., 514 F. Supp. 122, in favor of employer in an employment discrimination suit. The Court of Appeals, Harrison L. Winter, Chief Judge, held that running of 90-day statutory period in

which employee could commence his private Title VII action was tolled during period that there was pending a class action in which he was a member of the putative class but in which class certification was denied and action subsequently dismissed, even though he took no action to intervene as a named plaintiff in the class and did not seek to file an individual suit until after the class certification was denied.

Reversed and remanded.

1. Limitation of Actions — 126

Pendency of putative class action tolls running of limitations for members of putative class both for purposes of intervention and filing of new suit based upon cause of action embraced within putative class action until certification of class is denied.

2. Civil Rights — 40

Running of 90-day statutory period in which dismissed black employee could commence his private Title VII action to redress alleged racial discrimination in employment was tolled during period that there was pending a class action in which he was a member of the putative class but in which class certification was denied and action subsequently dismissed, even though he took no action to intervene as a named plaintiff in the class and did not seek to file an individual suit until after the class certification was denied. Civil Rights Act of 1964, §§ 701 et seq., 706(e) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-5(f)(1).

Norris C. Ramsey, Baltimore, Md., for appellant.

Richard J. Magid, Baltimore, Md. (George D. Solter, Francis John Gorman, Baltimore, Md., on brief), for appellee.

Before WINTER, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

HARRISON L. WINTER, Chief Judge:

The question we must decide is whether the running of the ninety-day statutory period, fixed by 42 U.S.C. § 2000e-5(f)(1), in which plaintiff could commence his private Title VII action to redress alleged racial discrimination in employment was tolled during the period that there was pending a class action in which plaintiff was a member of the putative class but in which class certification was denied and the action subsequently dismissed. The district court ruled that the running of the period was not tolled. 514 F. Supp. 122. We conclude otherwise. We reverse and remand for further proceedings.

I.

Plaintiff, a black male, was discharged by defendant on July 15, 1977. He duly filed a charge of discrimination with EEOC, alleging racially motivated harassment and termination. A right-to-sue letter issued on November 9, 1978.

Meanwhile, however, a class action against defendant alleging racial discrimination in employment in violation of Title VII was filed September 15, 1978. Plaintiff was a member of the putative class, and his claim was encompassed within the scope of the action. On July 13, 1979, a hearing was held and the court ruled on some, but not all, of the class certification issues. On September 4, 1980, the court finally denied class certification. The allegations of class-wide harassment were denied for lack of numerosity, and those of illegal termination because the named plaintiff, a probationary employee, was not representative of the class.

Plaintiff took no action to intervene as a named plaintiff in the class action; nor did he seek to file an individual

suit until after the class certification was denied. Plaintiff filed his own suit on October 27, 1980.[1]

He was promptly met by a motion for summary judgment on the ground that his suit was untimely since his right-to-sue notice issued November 9, 1978, and he did not file suit until October 27, 1980. Of course, as a factual matter, if the ninety-day statutory period for bringing suit was tolled until class certification was finally denied, unquestionably plaintiff instituted suit before the bar of the statute.

The district court granted summary judgment for defendant, ruling that plaintiff's right to file suit began to run on November 9, 1978, when he received his right-to-sue notification and that the running of the period was not tolled by the pendency of the intervening class action so as to permit plaintiff to file his own suit, although it would have tolled the running of the period had plaintiff sought to intervene in the putative class action after certification was denied.

II.

[1,2] As the district court recognized, the decision in this case depends upon the reading to be given to *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). There, the Court held that "the commencement of the original class action tolls the running of the statute for all purported members of the class who make timely motions *to intervene* after the court has found the suit inappropriate for class action status." *Id.* at 552-53, 94 S. Ct. at 765-66 (emphasis added). The Court has not applied the holding in *American Pipe* in any other context, but in *Eisen v. Carlisle &*

[1] On February 26, 1981, the class action was settled by the named plaintiffs and defendant, and it was dismissed with prejudice on March 2, 1981. On March 30, 1981, plaintiff sought and was granted leave to intervene in the class action for the sole purpose of appealing the denial of class certification. His notice of appeal, however, was untimely and so we lack jurisdiction to consider the merits of the denial.

Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), in deciding that notice must be sent to all members of a Rule 23(b)(3) class action because, *inter alia*, members of the class have a right to "opt out" of the class, the Court noted:

> Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe* . . . which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Id. 417 U.S. at 176 n.13, 94 S. Ct. at 2152 n. 13, 40 L. Ed. 2d at 748 n.13. So stated, the rule in *American Pipe* is not limited to intervenors but applies to all members of the class, or at least to those who "opt out" and, presumably, file individual suits during the pendency of the class action.

Whether to give the holding in *American Pipe* a broad reading to toll the statute so as to permit the filing of individual suits or to restrict it to cases where erstwhile timebarred plaintiffs seek only intervention has been the subject of conflicting adjudications in the district courts. *Compare, e.g., Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D.Pa. 1979) with *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980).

Among the circuits, only *Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2 Cir. 1977), and *Stull v. Bayard*, 561 F.2d 429, 433 (2 Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978) have directly decided the issue of whether the tolling rule of *American Pipe* is limited to intervention and both held that it was. However, in applying *American Pipeline* in other contexts, both *Susman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7 Cir. 1978), *cert. denied*, 445 U.S. 942, 100 S. Ct. 1336, 63 L. Ed. 2d 775 (1980), and *In re Finepaper Litigation*, 632 F.2d 1081, 1087 (3 Cir. 1980) stated the tolling rule

broadly enough to include new suits as well as motions to intervene in the aborted class action.

With due respect to the views of the Second Circuit, we think that *American Pipe* should be read to toll limitations with respect to a new suit as well as to a motion to intervene. The rationale of any statute of limitations is to put a defendant on notice of a claim with reasonable promptness so that defense evidence is not lost, memories have not faded and witnesses have not disappeared. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1943). Where plaintiff's individual complaint is within the scope of the putative class action, those purposes are fully served since the defendant has "sufficient information within the statutory period to timely apprise [it] . . . of the nature and scope of the prospective litigation." *Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1097 n.19 (3 Cir. 1975).[2] Therefore, intervention is not barred by the statute of limitations, and it seems to us to exalt form over substance to say that intervention would be permitted but not institution of a new suit.

Moreover, such a rule would encourage the filing of individual suits or interventions by members of the putative class while the issue of class certification was unresolved,[3] adding additional burden and expense to the

[2] In *American Pipe*, class certification was denied solely for lack of numerosity. But the court in *Haas* applied the tolling rule of *American Pipe* in a situation where, as here, class certification was denied because the named plaintiff was not representative of his class, reasoning that the defendant is put on sufficient notice of the prospective issues so long as the members of the class and their claims have been identified by the filing of the class action. 526 F.2d at 1097.

[3] A putative class member preferring an individual suit to joining the representatives of the class if it fails would be forced to file a protective action before the statute of limitations had run on his individual claim. Even if a plaintiff would be content to intervene after a denial of certification, the prudent plaintiff would nonetheless intervene before the class issue is decided; if the representatives settle their claims after certification is denied, there would obviously be no suit in which to intervene.

defendant.[4] In addition, intervention is often at the discretion of the district court, Rule 24(b), F.R.Civ.P., and intervention may be denied if it will defeat the jurisdiction of the district court, if additional or extrinsic issues would be brought in by the intervenor, or if intervention would delay or prejudice adjudication of the rights of the original parties. 3B Moore's Federal Practice ¶ 24.10[4](1980). Thus the rule of *American Pipe*, if limited to intervenors, might achieve the inequitable result of allowing some putative members of the class to obtain an adjudication of their claims while excluding others.

Thus we are persuaded that the correct reading of *American Pipe* is that the pendency of a putative class action tolls the running of limitations for members of the putative class both for purposes of intervention and the filing of a new suit based upon a cause of action embraced within the putative class action until certification of the class is denied. We so hold.

REVERSED AND REMANDED.

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[4] In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977), in holding that plaintiff, a putative member of the class, was entitled to intervene after judgment to appeal the denial of certification, the Court said in support of its holding that a contrary decision would "induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination. . . . The result would be the very 'multiplicity of activity which Rule 23 was designed to avoid.'" *Id.* at 394 n.15, 97 S. Ct. at 2470 n.15 (quoting *American Pipe & Construction Co. v. Utah*, *supra*, 414 U.S. at 551, 94 S. Ct. at 765.) So, too, it can be said in the instant case that the effect of a contrary holding would violate the spirit and purpose of class action Rule 23.

Theodore Parker

v.

Crown, Cork & Seal Company, Inc.

Civ. A. No. M-80-2839.

United States District Court, District Maryland.

April 20, 1981.

Action was instituted on a complaint alleging that plaintiff was harassed and terminated from his employment because of his race. On motion of defendant for summary judgment, the District Court, James R. Miller, Jr., J., held that filing of class based claims in another case did not toll period of limitations with respect to plaintiff's filing of his individual action under equal employment statute until class certification motions in other case were denied, notwithstanding claim that plaintiff, as a member of classes proposed in other case, could borrow any tolling that occurred in that case and use it for purposes of his own action, where plaintiff was not a class member who sought to intervene in original class suit, but was seeking benefit of tolling rule in an independent action on which statute of limitations had otherwise run.

Motion granted.

1. Civil Rights — 40

Unless tolled on recognized and equitable grounds, running of the statutory 90-day period extinguishes forever an individual's right to bring a private action under the equal employment statute. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1).

2. Civil Rights — 40

If a suit under the equal employment statute is not commenced within 90 days from the receipt by the claimant of the "Notice of Right to Sue" issued by the Equal Employment Opportunity Commission, the court is without jurisdiction to entertain the suit. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1).

3. Civil Rights — 40

Where plaintiff, who received the first "Notice of Right to Sue" from the EEOC more than 90 days from the time suit for alleged discrimination in employment was filed, failed to allege any equitable considerations militating in favor of giving effect to second "Notice of Right to Sue" issued by the EEOC, including the filing of a purported class action which did not toll the period of limitations with respect to plaintiff's individual action, the second notice was without legal effect and, given expiration of statutory 90-day period subsequent to the first notice, the private suit filed by the plaintiff under the equal employment provision was barred. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1); Fed. Rules Civ. Proc. Rules 23, 23(b)(2, 3), 28 U.S.C.A.

4. Limitation of Actions — 124, 126

The benefit of the tolling rule in *American Pipe*, that the commencement of the original class suit tolls the running of the statute for all purported members of the class who made timely motions to intervene after the court has found the suit inappropriate for class action status, is limited to those *class members who seek* to intervene in the original class suit and is inapplicable to independent suits on which the statute of limitations has otherwise run.

5. Civil Rights — 40

Filing of class based claims in another case did not toll period of limitations with respect to plaintiff's filing of his individual action under equal employment statute until

class certification motions in other case were denied, notwithstanding claim that plaintiff, as a member of classes proposed in other case, could borrow any tolling that occurred in that case and use it for purposes of his own action, where plaintiff was not a class member who sought to intervene in original class suit, but was seeking benefit of tolling rule in an independent action on which statute of limitations had otherwise run. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1); Fed. Rules Civ. Proc. Rules 23, 23(b)(2, 3), 28 U.S.C.A.

Norris C. Ramsey, Baltimore, Md., for plaintiff.

George D. Solter, Richard J. Magid, and Francis John Gorman of Whiteford, Taylor, Preston, Trimble & Johnston, Baltimore, Md., for defendant.

MEMORANDUM AND ORDER

JAMES R. MILLER, Jr., District Judge.

The plaintiff, Theodore Parker, brought this Title VII action alleging that he was harassed and terminated from his job because of his race. The defendant, Crown, Cork & Seal Company, Inc. (Crown), has moved for summary judgment on the grounds that Parker did not file his complaint in this action within the 90-day period required by 42 U.S.C. § 2000e-5(f)(1). Parker has filed a memorandum opposing Crown's motion. The material facts necessary for a resolution of this motion are undisputed. Since only a legal question is presented, the court concludes that no hearing is necessary. Local Rule 6(E).

I. Factual Overview

On July 15, 1977, Parker was permanently discharged by Crown. (Paper No. 14, Ex. 4). On October 3, 1977, he filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging racially motivated harassment and termination by Crown (Paper No.

15, Ex. B; see Paper No. 14, Ex. 7). By letter dated October 19, 1977, the Maryland Commission on Human Relations (MCHR) notified Parker that his charge had been deferred to it for investigation (Paper No. 14, Ex. 6). The MCHR issued a written decision on September 20, 1978, finding no probable cause to believe that Parker had been terminated or harassed by Crown because of his race (Paper No. 14, Ex. 8).

On November 9, 1978, the EEOC issued a "Letter of Determination," addressed to Parker, Crown, and Parker's union, stating that there was no reasonable cause to believe that Parker's charge of racial discrimination was true. The letter also stated:

> "Should the Charging Party wish to pursue this matter further, he/she may do so by filing a private action in Federal District Court within 90 days of the receipt of this letter, and by taking the other procedural steps set out in the enclosed NOTICE-OF-RIGHT TO SUE."

Paper No. 14, Ex. 10.

A "Notice of Right to Sue" was issued by the EEOC on November 9, 1978. It was addressed to Parker at 1316 South Hanover Street, Baltimore, Maryland 21230, and to Crown at its corporate offices (Paper No. 14, Ex. 9). A second "Notice of Right to Sue," dated July 25, 1980, was issued to Parker and a copy was sent to Parker's lawyer (Paper No. 14, Ex. 11). This action was filed on October 27, 1980 (Paper No. 1). Parker's deposition establishes that he received the first "Notice of Right to Sue" by mail shortly after it was issued by the EEOC (Paper No. 14, at pp. 134-39).

II. Discussion

Crown contends that since the first "Notice of Right to Sue" was issued by the EEOC on November 9, 1978, and received by Parker shortly thereafter, the filing of the present case on October 27, 1980, is untimely under 42 U.S.C. § 2000e-5(f)(1) because the 90-day period had

expired. According to Crown, the second "Notice of Right to Sue" was without legal effect and did not operate to begin a new 90-day period.

Parker does not challenge directly Crown's contention that the 90-day period began to run from his receipt of the first notice. Instead, Parker contends (1) the filing of the purported class action in *Randy Pendleton et al. v. Crown, Cork & Seal Co., Inc.*, Civil Action No. M-78-1734, tolled the limitations period for all members of the classes proposed in that case; (2) the period of limitations did not commence to run again on the discrimination claims of the putative class members until the court issued its Memorandum and Order of September 4, 1980, denying the remaining class certification issues; and (3) as a member of the putative classes, he had 90 days from the court's Memorandum and Order of September 4, 1980, in which to file his individual Title VII suit. For the reasons set out below the court will grant Crown's motion for summary judgment.

[1, 2] It is well settled in this Circuit that unless tolled "on recognized equitable grounds," *Stebbins v. Nationwide Mutual Insurance Co.*, 469 F.2d 268, 269 (4th Cir. 1972), *cert. denied*, 410 U.S. 939, 93 S. Ct. 1403, 35 L. Ed. 2d 606 (1973), the running of the 90-day period set out in 42 U.S.C. § 2000e-5(f)(1) extinguishes forever an individual's right to bring a private Title VII action. *E.g., EEOC v. Cleveland Mills Co.*, 502 F.2d 153, 156 (4th Cir. 1974); *Bailey v. Boilermakers Local 667*, 480 F. Supp. 274, 282 (D.C.N.D.W.Va. 1979). Consequently, if a suit is not commenced within 90 days from the receipt by the claimant of the "Notice of Right to Sue" the court is without jurisdiction to entertain the action. *Menn v. Amstar Corp.*, 476 F. Supp. 303, 305 (D.C.D.Md. 1979). *See Garner v. E. I. DuPont De Nemours & Co.*, 538 F.2d 611, 614-15 (4th Cir. 1976).

[3] The undisputed evidence submitted by Crown demonstrates that Parker in fact received the first "Notice of Right to Sue" more than 90 days before the instant suit

was filed. Parker has not alleged any equitable considerations militating in favor of giving effect to the second notice. *See, e.g., Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086-87 (10th Cir. 1980); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 245-46 (5th Cir. 1980). The court concludes, therefore, that the second notice was without legal effect and Parker's 90-day period within which to file a private Title VII suit commenced to run upon his receipt of the first notice. *See, e.g., Cleveland v. Douglas Aircraft Co.*, 509 F.2d 1027, 1030 (9th Cir. 1975); *Ford v. General Motors Corp.*, 452 F. Supp. 355, 357 (D.C.E.D.Mo. 1978); *Fannie v. Chamberlain Mfg. Corp.*, 445 F. Supp. 65, 78 (D.C.W.D.Pa. 1977).

A more substantial issue is whether the filing of the class based claims in the *Pendleton* case tolled the period of limitations, with respect to Parker's filing of his individual action, until the class certification motions in *Pendleton* were denied. Parker contends that as a member of the classes proposed in *Pendleton*, he may borrow any tolling that occurred in that case and use it for the purposes of this case. In support of this argument, Parker urges this court to interpret broadly the Supreme Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974).

American Pipe involved a private antitrust class action that had been filed eleven days before the running of the statute of limitations. The trial court subsequently denied the class certification motion on the ground that the purported class failed to satisfy the numerosity requirement of Rule 23(a)(1). Eight days after the entry of the order denying class status, a number of the putative class members moved to intervene as plaintiffs. The trial court denied their motions as untimely.

Reasoning that a refusal to toll the statute of limitations with respect to the claims of the putative class members, for the period between the filing of the suit and the trial court's ruling on the class certification motion, would

result in the filing of numerous intervention petitions prior to the class determination, the Court held that

> "the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene after the court has found the suit inappropriate for class action status.*"

414 U.S. at 553, 94 S. Ct. at 766 (emphasis supplied).

Some Circuit Courts have suggested, *see, e. g., In re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3d Cir. 1980); *Sussman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied, Eberstadt v. Flamm*, 445 U.S. 942, 100 S. Ct. 1337, 63 L. Ed. 2d 775 (1980), and some District Courts have apparently held, *see, e. g., Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (D.C.E.D. Pa. 1979); *Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (D.C.E.D.Pa.1979); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (D.C.E.D.La. 1978); *Bantonlina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n.19 (D.C.D.Hawaii 1976), that the Supreme Court's decision in *American Pipe* created a broad, general rule that the statutes of limitation are tolled with respect to the claims of all putative class members until the trial court rules on the class certification motion. In effect, these cases suggest that a putative class member may take advantage of the tolling arising from the class suit, and maintain an independent action subsequent to the denial of the class certification motion, notwithstanding that such individuals did not seek to intervene in the original class suit.

Although there is dictum in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13, 94 S. Ct. 2140, 2152 n.13, 40 L. Ed. 2d 732 (1974), suggesting such a reading of *American Pipe* as applied to Rule 23(b)(3) suits, neither the facts nor the reasoning of *American Pipe* support the broad rule urged by Parker with respect to Title VII suits seeking class status under Rule 23(b)(2). The Court in *American Pipe* was concerned that if notice to members of a putative Rule 23(b)(3) class "did not reach them until

after the running of the limitation period," such persons would be compelled to file intervention motions prior to the class certification decision, thereby creating "the multiplicity of activity which Rule 23 was designed to avoid." 414 U.S. at 551, 94 S. Ct. at 765. The decision to allow intervention by class members subsequent to the trial court's decision to deny class status was held to be fair to the defendant because:

> "Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, *whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.*"

414 U.S. at 555, 94 S. Ct. at 767 (footnote omitted) (emphasis supplied).

[4] The conclusion that the benefit of the *American Pipe* tolling rule is limited to those class members who seek to intervene in the original class suit, and is inapplicable to independent suits on which the statute of limitations has otherwise run, has been reached by a number of courts. *See, e. g., Stull v. Bayard,* 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied,* 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978); *Arneil v. Ramsey,* 550 F.2d 774, 783 (2d Cir. 1977); *Gluck v. Amicor, Inc.,* 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980); *Jefferson v. H. K. Porter Co.,* 485 F. Supp. 356, 360-61 (D.C.N.D.Ala. 1980); *Wachovia Bank & Trust Co. v. National Student Marketing Corp.,* 461 F. Supp. 999, 1012 (D.C.D.C. 1978). In addition, Part II of Judge Widener's opinion in *Paxman v. Campbell,* 612 F.2d 848, 855 (4th Cir. 1980) (en banc), in which all members of the court except for Judge Phillips concurred, suggests that if presented with the question, the Fourth Circuit would limit the rule of *American Pipe* to class members seeking to intervene in the original suit. *See also 3B Moore's Federal Practice* ¶ 23.-90[3] at 23-555 to 23-556 n.16 (1980) ("Although the statute of limitations is tolled by the filing of a class action for purposes of permitting a member of the purported class to intervene after the class has been

disallowed, it is doubtful that a class member will be permitted to bring an individual action after the statute of limitations has run.").

[5] Finally, the interpretation of *American Pipe* urged by Parker is unsupportable from a policy standpoint. Although relief under Title VII may be awarded on a class basis to those unnamed class members who have not exhausted their administrative remedies, *see, e. g., Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 771, 96 S. Ct. 1251, 1267, 47 L. Ed. 2d 444 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8, 95 S. Ct. 2362, 2370 n.8, 45 L. Ed. 2d 280 (1975), the rule urged by Parker would eviscerate Title VII's time limitations concerning suits brought by individual claimants. Under Parker's theory, if a broad based Title VII class action suit were filed against a particular defendant the period of limitations on all claims would be tolled. Once the trial court denied class status in the original suit, that defendant would be subject to untold numbers of individual Title VII suits brought by persons who had not timely pursued their administrative remedies.

In light of the purposes underlying Title VII's time limitations, this court doubts that the Supreme Court would sanction, or that Congress intended, the result urged by Parker. The court holds, therefore, that the tolling rule of *American Pipe* is applicable only to Title VII class members who seek intervention in the original suit. Consequently, Parker's 90-day period for filing suit was not tolled by the *Pendleton* suit, and his filing of the instant case on October 27, 1980, was untimely.

Accordingly, it is this 20th day of April, 1981, *ORDERED:*

(1) Crown's motion for summary judgment is GRANTED.

(2) The Clerk is instructed to forward a copy of this Memorandum and Order to counsel for the parties.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the

person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Fed. R. Civ. P. 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class

if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural

matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

No. 82-118

Office - Supreme Court, U.S.
FILED
AUG 31 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GEORGE D. SOLTER,
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OCTOBER TERM, 1982

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REASONS FOR GRANTING THE WRIT

1. THE DECISION IN THE PRESENT CASE ALSO DIRECTLY CONFLICTS WITH AN OPINION RECENTLY ISSUED BY THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

On July 14, 1982 the United States Court of Appeals for the Ninth Circuit issued an opinion in the case of *Pavlak v.*

Church, 681 F.2d 617 (9th Cir. 1982) which directly conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in the present case. In *Pavlak*, the court stated the legal issue in essentially the same terms as the Fourth Circuit: "[t]he question here is whether, after certification of a Rule 23(b)(3) class is denied, a plaintiff, who was a member of the putative class, may claim that the statute of limitations was tolled pending determination of the certification motion so that she may file an independent suit." *Id.* at 617-18. However, the Ninth Circuit, following the Second Circuit, concluded that the statute of limitations was not tolled during the pendency of a proposed class action for purposes of permitting a putative class member to file a timely independent suit. *Id.* at 618. In so doing, the Ninth Circuit unequivocally joined the Second Circuit in a legal position diametrically opposed to that established by the Fourth Circuit in the present case.

Although *Pavlak* did not cite the Fourth Circuit's opinion in the present case, the existing conflict among the circuits is apparent and certainly unsettling. The *Pavlak* court noted:

> Our resolution of this case follows that of the Second Circuit in *Stull v. Bayard*, 561 F.2d 429, 433 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S. Ct. 769, 54 L. Ed. 2d 783 (1978), *aff'g*, 424 F. Supp. 937, 941-43 (S.D.N.Y. 1977). The District of Columbia Circuit, in *Wachovia Bank and Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) (alternative reason), *cert. denied*, 452 U.S. 954, 101 S. Ct. 3098, 69 L. Ed. 2d 965 (1981), expressed a consistent view. We are aware of the contrary suggestion in *Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978), *vacated for reconsideration*, 445 U.S. 940, 100 S. Ct. 1334, 63 L. Ed. 2d 773 (1980). Even assuming the Fifth Circuit would reach the suggested conclusion were the issue squarely presented, we agree with the resolution

> reached by the Second Circuit, for reasons expressed in this opinion.

Id. at 621. In its opinion, the Fourth Circuit also recognized the conflicting positions, and couched its conclusion in the following fashion: "[w]ith due respect to the views of the Second Circuit, we think that *American Pipe* should be read to toll limitations with respect to a new suit as well as to a motion to intervene." *Parker v. Crown, Cork & Seal Co.*, 677 F.2d 391, 393 (4th Cir. 1982).

In the present case, the Fourth Circuit relied heavily upon a footnote in the case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13, 94 S. Ct. 2140, 2152 n.13, 40 L. Ed. 2d 732, 748 n.13 (1974), as authority for the proposition that the commencement of a class action tolls the applicable statute of limitations as to all members of the class. *See Parker v. Crown, Cork & Seal Co.*, 677 F.2d at 393. However, the *Pavlak* court specifically rejected that footnote as controlling authority.

> We do not read it [footnote 13], however, as effecting a drastic expansion of *American Pipe* beyond the solid equities of its factual underpinnings. The footnote seems to allow a class member who opts out at the time of receiving notice of the institution of a class action to commence his own separate suit. It does not, however, authorize tolling of the statute of limitations for those who file separate actions at the time of denial of class certification. That issue was not presented to the Court in *Eisen*.

681 F.2d at 620-21.

It is submitted that the *Pavlak* opinion clearly illustrates the substantive and continuing conflict among the circuits involving an important matter of judicial administration. This disparity of views rests squarely upon

appellate interpretations of Supreme Court decisions which can be resolved only by this Court. Once again, the far-reaching implications of a decision in the present case require this Court's consideration.

Respectfully submitted,

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No. 82-118

Office-Supreme Court, U.S.
FILED
DEC 28 1982
ALEXANDER L. STEVAS,
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed July 21, 1982.
Certiorari Granted November 8, 1982.

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No. 82-118

In The Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
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Respondent.

ON WRIT OF CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

10/27/80—(1) Complaint and Attachment.

11/26/80—(4) Answer.

01/06/81—(9) Motion of Plaintiffs to Consolidate Civil Action No. M-78-1734 with Civil Action No. M-80-2839.

01/09/81—(11) Memorandum of Defendant in Opposition to Motion of Plaintiff to Consolidate Civil Action Nos. M-78-1734 and M-80-2839.

03/04/81—(14) Deposition of Theodore Parker taken on February 18, 1981 on behalf of Defendant and Attachments.

03/27/81—(15) Motion of Defendant for Summary Judgment, Memorandum, Request for Hearing and Exhibits A to H.

04/06/81—(16) Opposition of Plaintiff to the Motion of Defendant for Summary Judgment.

04/13/81—(17) Reply of Defendant to the Opposition of Plaintiff to the Motion of said Defendant for Summary Judgment.

04/20/81—(18) Memorandum and Order (Miller, J.) "GRANTING" Motion of Defendant for Summary Judgment.

04/22/81—(19) JUDGMENT (Clerk) entering Judgment in favor of Defendant against the Plaintiff.

05/14/81—(20) Notice of Appeal of Plaintiff.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

06/09/81—Case docketed.

06/23/81—MOTION (A-186) of A, case no. 81-1465, to consolidate appeals nos. 81-1465 and 81-1483, filed.

06/29/81—ORDER consolidating appeals nos. 81-1465 and 81-1483 pursuant to Local Rule 19, filed.

07/06/81—MOTION (B-9) to dismiss appeal no. 81-1483, filed.

07/06/81—MEMORANDUM in support of motion to dismiss appeal no. 81-1483, filed.

07/15/81—MOTION (B-9) of As Parker, Pendleton and Allen to dismiss appeal no. 81-1483 pursuant to Rule 42(b), FRAP, filed.

07/17/81—ORDER dismissing case no. 81-1483 pursuant to Rule 42(b), FRAP, filed.

12/07/81—APPEAL argued.

04/23/82—OPINION of the Fourth Circuit reversing and remanding the case to the District Court for further proceedings.

04/23/82—JUDGMENT.

05/14/82—MANDATE issued.

07/21/82—PETITION for a Writ of Certiorari filed.

11/08/82—CERTIORARI granted.

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

1. Memorandum and Order of District Court filed April 20, 1981 (at page 8a).
2. Opinion of Fourth Circuit filed April 23, 1982 (at page 1a).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DETERMINATION LETTER

(Seal) Charging Numbers: 033-780089 &
033-780090
E107-499

Theodore Parker
1316 S. Hanover Street
Baltimore, Maryland 21230

Charging Party

Crown, Cork & Seal
4200 O'Donnell Street
Baltimore, Maryland 21224

United Steel Workers of America
3600 Eastern Avenue
Baltimore, Maryland 21224

Respondents

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission the following determination as to the merits of the subject charge.

Respondents are an employer and a union within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and all jurisdictional requirements have been met. Substantial weight has been accorded to the findings of the Maryland Commission on Human Relations, which are attached.

Having examined the Maryland Commission on Human Relations' findings and the record presented, I conclude that there is not reasonable cause to believe that the charge is true.

This Determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, he/she may do so by filing a private action in Federal District Court within 90 days of the receipt of this letter, and by taking the

other procedural steps set out in the enclosed NOTICE-OF-RIGHT TO SUE.

ON BEHALF OF THE COMMISSION:

Date 11-9-78

DOROTHY E. MEAD
Acting District Director

Enclosures: (3)
706 Agency Findings
Notice of Right to Sue
Copy of Charge

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Seal) (Dismissal)

To:
Theodore Parker
1316 S. Hanover Street
Baltimore, Maryland 21230

From:
Equal Employment Opportunity Commission
Baltimore District Office
711 W. 40th Street Room 210
Baltimore, Maryland 21211

Charge Number:
033-780089 & 033-780090

EEOC Representative:
Gerald S. Kiel, Regional Attorney

Telephone Number:
(301) 962-3870

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form.) [below]

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

☐ No jurisdiction, therefore the Commission has no authority to process your charge further.

☒ No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

☐ You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than

30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U. S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. *Your request to the U. S. District Court should be made well in advance of the end of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U. S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

Date: 11-9-78 DOROTHY E. MEAD, Acting District Director

cc: Crown, Cork & Seal
4200 O'Donnell Street
Baltimore, Maryland 21224

United Steel Workers of America
3600 Eastern Avenue
Baltimore, Maryland 21224

Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964, as amended, states:

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil

action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, a governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(f)(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found

within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

In the United States District Court
for the District of Maryland

Civil Action No. M-80-2839

Theodore Parker

v.

Crown, Cork & Seal Company, Inc.

JUDGMENT

In accordance with the Memorandum and Order dated April 20, 1981 and filed in the above entitled case, it is

ORDERED and ADJUDGED: THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF DEFENDANT AGAINST THE PLAINTIFF.

Dated at Baltimore, Maryland this 22nd day of April, 1981.

PAUL R. SCHLITZ,
Clerk

By RON LAWSON
Deputy Clerk.

United States Court of Appeals
for the Fourth Circuit

No. 81-1465

Theodore Parker,

Appellant,

versus

Crown, Cork and Seal Company, Inc.,

Appellee.

Appeal from the United States District Court
for the District of Maryland

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and remanded to the United States District Court for the District of Maryland at Baltimore for further proceedings consistent with the opinion of this court filed herewith.

WILLIAM K. SLATE, II,
Clerk.

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK AND SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NORRIS C. RAMSEY, P.A.,
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Baltimore, Maryland 21202,
301–752-1646,

JAMES L. FOSTER,
222 St. Paul Pl., Ste. 601,
Baltimore, Maryland 21202,
301–837-1566,
Counsel for Respondent.

QUESTION PRESENTED

Whether the pendency of a proposed class action tolls the running of the ninety-day statute of limitations (under 42 U.S.C. §2000e-5(f)(1) (1972) for purposes of allowing Respondent (a putative class member) to file a separate, private Title VII action after certification of the putative class has been denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.

Petitioner,

v.

THEODORE PARKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, Theodore Parker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 23, 1982 be denied.

OPINION BELOW

The opinion of the Court of Appeals is reported in 677 F. 2d 391. The opinion of the United States District Court for the District of Maryland is reported in 514 F. Supp. 122. Both opinions appear in the Petitioner's Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISION AND RULE INVOLVED

United States Code, Title 42, §2000e-5(f)(1) (1976); (See p. 17a of Petitioner's Appendix).

Federal Rules of Civil Procedure 23; (See p. 18a of Petitioner's Appendix).

STATEMENT OF THE CASE

The facts of the case are stated fully by the Petitioner in its Petition

For Certiorari and the decision of the District Court and Court of Appeals. (See Petitioner's Appendix).

REASONS FOR NOT GRANTING THE WRIT

1. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S DECISIONS IN EISEN v. CARLISLE & JACQUELIN AND AMERICAN PIPE AND CONSTRUCTION CO. v. UTAH

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2149, 40 L. Ed. 2d 732 (1974), in deciding that notice must be sent to all members of a Rule 23(b)(3) class because, inter alia, members of the class have a right to "opt out" of the class, the Court noted:

> "Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in American Pipe ...which established that commencement of a class action tolls the applicable statute of limitations as to all

members of the class."

Id. 417 U.S. at 176 n. 13, 94 S. Ct. at 2152 n. 13, 40 L. Ed. 2d at 748 n. 13.

In disposing of the petitioner's second contention, the Court stated:

> "Second, petitioner contends that individual notice is unnecessary in this case, because no prospective class member has a large enough stake in the matter to justify separate litigation of his individual claim. Hence, class members lack any incentive to opt out of the class action even if notified.
>
> The short answer to these arguments is that individual notice to identifiable class is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. 28 U.S.C. App., pp. 7765, 7768. Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclu-

> sion from the action and thereby preserve his opportunity to press his claim separate ..." (emphasis added).

Id. 417 U.S. at 176. This language clearly shows that this Court has resolved this issue, and there is no need to grant certiorari, and it should accordingly affirm Parker v. Crown, Cork & Seal Company, Inc., 677 F. 2d 391 (4th Cir. 1982).

2. THE DECISION BELOW IS CONSISTENT WITH EXISTING SUPREME COURT LAW WHICH SOLVES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE JUDICIAL ADMINISTRATION OF CASES BROUGHT PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

In American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554-556 (1974), the Court set forth the policy reasons for tolling the limitations period with the commencement of a suit as a class action.

> "As the Court stated in Order of Railroad Telegraphers v. Railway Express Agency, 321

U.S. 342, statutory limitation periods are 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Id., at 348-349. The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,' Burnett v. New York Central R. Co., 380 U.S. 424, 428, are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether

> the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.
>
> Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchant, ... this interpretation of the Rule is nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." (footnote and citations omitted).

The Petitioner argues, however, that where a defendant is not only subject to liability through a class action and/or individual actions by the named class representative plus intervenors, but is also subject to further liability in separate actions by any one or all of

the putative class members, there is insufficient notice to the class action defendant to justify an equitable tolling of the statute of limitations.

This argument is specious. As the facts of this case clearly show, the Respondent, a terminated black employee, was a member of the proposed class in Pendelton v. Crown, Cork & Seal Co., Inc., Civil No. M-78-1734 (D. Md. filed Sept. 15, 1978). The Petitioner was well aware that the Respondent was a member of the class and it would be required to defend against his claim whether it was at the liability stage or backpay stage. Teamsters v. U.S., 431 U.S. 324, 359, 361-362 (1977). Thus, it was on sufficient notice that it could be required to defend against the suit whether in a separate lawsuit or as a part of a class or intervention action.

The Petitioner further argues that

the discovery and proof in an individual Title VII action is so different from the discovery and proof in a Title VII class action that the notice given to it by the commencement of a class action is insufficient to put it on notice as to the claims of each individual class member, and thus, it would be unduly prejudiced by the filing of a new independent individual lawsuit.

This argument is contrary to the holding in American Pipe and the Petitioner's own arguments. While the Petitioner agrees that the Respondent could have intervened in the class suit and presented his individual case, and it would have been required to defend against it, it argues that it could not defend against a separate lawsuit. This makes no sense whatsoever, in each instance it has been given the same notice, and as a practical

matter, whether it is an intervention or a separate lawsuit the plaintiff and the defendant would be put to the same burdens of proof.

Moreover, the Petitioner's argument that it would be prejudiced because the burdens of proof in an individual action and a class action are so different that it would be prejudiced by a new lawsuit has no merit whatsoever.

Respondent submits that it is well recognized that statistical evidence of class-wide discrimination, the same as that used in class actions may be used to support individual causes of action. Teamsters v. U.S., supra. at 335 n. 15; McDonnell Douglas v. Green, 411 U.S. 792, 804 (1973); Wright v. National Archives and Record Service, 609 F. 2d 702, 711 n. 8 (4th Cir. 1979). The Court in individual actions can order class-wide injunc-

tive relief for what is in effect the plaintiff's class. See Title VII §706(g); Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1201-1202 (7th Cir.), cert. denied, 404 U.S. 991, (1971), on remand 56 FRD 420 (D. Ill. 1972); Meyer v. Brown & Root Constr. Co., 661 F. 2d 369, 374 (5th Cir. 1981).

3. THE FOURTH CIRCUIT'S INTERPRETATION OF THE TOLLING RULE IS CONSISTENT WITH THE PURPOSE OF RULE 23, F.R.CIV.P. AND THE INTERPRETATION URGED BY THE PETITIONER AND OTHER CIRCUITS WILL RESULT IN A MULTIPLICITY OF LITIGATION WHICH RULE 23 F.R.CIV.P. WAS DESIGNED TO AVOID

The Second and Ninth Circuits have held that the tolling rule is only applicable to those putative class members who file timely motions to intervene in the proposed class action lawsuit. Arneil v. Ramsey, 550 F. 2d 774 (2nd Cir. 1977);

Paulak v. Church, 681 F. 2d 617 (9th Cir. 1982). Petitioner urges this interpretation of American Pipe, supra. by this Court.

This interpretation of the rule would result in the multiplicity of litigation that Rule 23 F.R.Civ.P. was designed to avoid. It would encourage the filing of individual suits and motions to intervene prior to the running of the limitations period, or while the issue of class certification was unresolved adding additional burden and expense to the defendant. In addition, intervention would require class members to intervene in lawsuits which may be located in other Districts far from their residences. Thus, the rule of American Pipe, if limited to intervenors, might achieve the inequitable result of allowing some putative members of the class to obtain an adjudication of

their claims while excluding others.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-118

CROWN, CORK & SEAL COMPANY, INC., PETITIONER

v.

THEODORE PARKER

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 38.4 of the Rules of this Court, the Solicitor General, on behalf of the Equal Employment Opportunity Commission, requests that the time allotted to respondent for oral argument be divided between respondent and the Equal Employment Opportunity Commission, with 20 minutes allocated to respondent and 10 minutes to the Commission. The Commission has filed a brief as amicus curiae supporting respondent in this case.

The question presented by this case is whether the filing of a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., suspends the running of the statute of limitations against the claims of members of the asserted class until class certification is denied, so that they may file separate actions. The Commission has primary responsibility for the enforcement of Title VII. Private enforcement is an important adjunct to the Commission's efforts, and the resolution of the question presented by this case will significantly affect the efficacy of private enforcement.

After having had an opportunity to read the Commission's brief, respondent wishes to cede to the Commission 10 minutes of argument time and therefore joins in this motion. We believe that this division of time will significantly contribute to the elucidation of the issue presented by this case in oral argument.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-118

CROWN, CORK & SEAL COMPANY, INC., PETITIONER

v.

THEODORE PARKER

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANSWER IN OPPOSITION TO MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 42.4 of the Rules of this Court, the Petitioner, by its counsel, opposes the Motion of the Solicitor General, on behalf of the Equal Employment Opportunity Commission, for leave to divide the oral argument between the Respondent and the Equal Employment Opportunity Commission, and as grounds for same, respectfully represents as follows:

1. The Motion for Divided Argument was not filed within the prescribed time.

Rule 38.7 of the Rules of this Court permits counsel for an amicus curiae, with the consent of a party, to move for leave to argue orally on the side of such party, such motion being subject to paragraph .4 of Rule 38. Paragraph .4 provides that such request be filed no later than fifteen days after the filing of the Petitioner's or Appellant's brief on the merits. Petitioner's brief was filed on December 22, 1982 and the Motion to Divide Argument was filed on or about February 16, 1983. The Motion is therefore not timely.

2. The Motion fails to show why more than one counsel should be heard.

Rule 38.4 provides that the motion requesting divided argument show with specificity and conciseness why it should be granted. Paragraph .7 further provides that the motion set forth why such argument is thought to provide assistance to the Court not otherwise available. These Rules also provide that divided arguments are not favored and will be allowed only in the most extraordinary circumstances. The Motion of the Solicitor General is broad and general and fails to meet the requirements of the Rule.

Argument by the Solicitor General will provide no additional assistance to the Court since the Solicitor General has adopted in his Brief precisely the position of the Respondent and is merely corroborative and expansive of that position. The position of the Solicitor General adds no new or different issue and therefore is purely cumulative.

3. The interest of the Equal Employment Opportunity Commission is not sufficient to justify argument by its counsel.

While Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 (e), et seq., unquestionably places responsibility for enforcement of private rights initially with the Commission, once the Commission has reached its determination (in this case, that no reasonable cause existed) and serves its 90-day Notice of Right to Sue upon the charging party, it has no further interest in that Complaint and has in fact relinquished jurisdiction. Since the issue in the pending Petition deals solely with the tolling of the statute of limitations as to individual private actions brought after relinquishing jurisdiction, the interest of the Commission is not sufficient to justify argument by its counsel as amicus curiae.

4. The granting of the Motion would be unfair to the Petitioner.

To allow a division of argument between the Respondent and the Commission as amicus curiae without granting the same privilege to Petitioner would be unfair and inequitable and would disadvantage the Petitioner in its oral argument.

The Petitioner, therefore, requests that the Motion to Divide Argument be denied, or in the alternative, that if the Motion is granted, the Petitioner be granted leave to divide its argument as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of February, 1983, a copy of the foregoing Answer to Motion for Divided Argument was mailed by United States mail, first class, postage prepaid, to the following persons who represent all parties to be served:

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No. 82-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the pendency of a proposed class action toll the running of the ninety-day statutory period for the commencement of a Title VII suit, so that Respondent Parker, as a putative class member, may file a separate, private Title VII action after certification of the putative class has been denied?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is reported at 677 F.2d 391 (4th Cir. 1982) and is reproduced at p. 1a of the Petition for a Writ of Certiorari. The Judgment of the Court of Appeals for the Fourth Circuit may be found at J.A. 13A.

The Opinion of the District Court for the District of Maryland is reported at 514 F.Supp. 122 (D.Md. 1981) and is reproduced at p. 8a of the Petition for a Writ of Certiorari. The Judgment of the District Court may be found at J.A. 12A.

JURISDICTION

The Judgment of the Court of Appeals (J.A. 13A) was entered on April 23, 1982. The Petition for a Writ

of Certiorari was filed on July 21, 1982 and was granted on November 8, 1982. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND FEDERAL RULE INVOLVED

1. 42 U.S.C. § 2000e-5(f)(1) is reproduced at p. 17a of the Petition for a Writ of Certiorari.

2. Rule 23 of the Federal Rules of Civil Procedure is reproduced at p. 18a of the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. The Parker Case.

Respondent Parker, a black male, was discharged from his employment with Petitioner Crown, Cork & Seal Company, Inc.* (hereinafter "Crown") on July 15, 1977. On October 3, 1977, Parker filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging racially discriminatory harassment and discharge by Crown. In a letter dated November 9, 1978, the EEOC issued a determination that there was no probable cause to believe that Parker's charge of discrimination against Crown was true (J.A. 5A), and on the same date issued to Parker a "notice of right-to-sue." (J.A. 7A). Parker received that notice of right-to-sue but did not file suit within the ninety-day period prescribed under 42 U.S.C. § 2000e-5(f)(1).

On October 27, 1980, Parker filed the present Title VII action in the United States District Court for the District of Maryland alleging that Crown discriminatorily harassed and discharged him on account of his race. The jurisdiction of the district court was invoked under Title

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* Petitioner sent to the clerk's office of this Court a letter dated July 22, 1982, pursuant to the requirements of Rule 28.1 of the Rules of the Supreme Court.

VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, *et seq.* On November 26, 1980, Crown filed its answer denying Parker's allegations of discrimination and on March 27, 1981, moved for summary judgment. In its motion, Crown asserted that nearly two years had passed since Parker received his ninety-day notice of right-to-sue, and therefore, Parker had not satisfied a jurisdictional prerequisite to the commencement of his suit. In a Memorandum and Order filed April 20, 1981, the District Court granted Crown's motion for summary judgment. (Petition for Cert. at 8a). Judgment was entered on April 22, 1981. (J.A. 12A). Parker appealed that judgment to the United States Court of Appeals for the Fourth Circuit. In an Opinion dated April 23, 1982, the United States Court of Appeals for the Fourth Circuit reversed the District Court and remanded the case. (Petition for Cert. at 1a).

B. The Pendleton Case.

On September 15, 1978, two discharged black employees, Pendleton and Allen, filed a Title VII class action in the United States District Court for the District of Maryland, *Pendleton v. Crown, Cork & Seal Co.*, Civil No. M-78-1734 (D.Md.), on their own behalf, and on behalf of all similarly situated black persons, alleging racial discrimination by Crown in various employment practices, including harassment and discharge. (App. A to Petitioner's Brief at 2a). On May 31, 1979, the *Pendleton* plaintiffs moved to certify a class, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, consisting of all black persons who could have filed a charge of racially discriminatory practices, including harassment and discharge, against Crown on or after March 31, 1973. By a Memorandum and Order dated September 4, 1980, and after an evidentiary hearing, the District Court denied that motion for class certification. (App. B to Petitioner's Brief at 17a).

On February 26, 1981, a stipulated order of dismissal with prejudice was signed by the District Court as the result of a settlement of the remaining individual claims of Pendleton and Allen.

On March 30, 1981, Parker filed a motion, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene in the *Pendleton* case, for purposes of filing an appeal of the denial of class certification. The District Court, in a Memorandum and Order dated April 16, 1981, granted Parker's motion to intervene. (App. C to Petitioner's Brief at 20a). Thereafter, on May 14, 1981, Parker noticed an appeal of the denial of class certification in *Pendleton* to the Court of Appeals for the Fourth Circuit. However, Parker's appeal in *Pendleton* was not timely, and on July 17, 1981 the Fourth Circuit issued an Order dismissing that appeal.

SUMMARY OF ARGUMENT

I. In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 553 (1974), this Court held that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to *intervene* after the court has found the suit inappropriate for class action status." (Emphasis added). In the present case, the Fourth Circuit has established a rule which extends the benefit of *American Pipe* tolling to putative class members who *file a new suit* based on a cause of action asserted in the class suit.

The Fourth Circuit tolling rule is not supported by any decision of this Court. Indeed, the circuit courts which have directly addressed the question of tolling to allow putative class members to file separate suits have uniformly rejected that proposition. Thus, the Fourth Circuit rule lacks authoritative support.

II. The Fourth Circuit rule should also be rejected because it improperly adopts the language of the *Ameri-*

can Pipe rule and mechanically applies it without any consideration of the underlying circumstances or purposes which originally prompted this Court to fashion that rule. Correctly analyzed, the *American Pipe* tolling doctrine was formulated for the very limited purpose of effectuating the objectives of Rule 23—efficiency and economy in litigation. However, the operation of the Fourth Circuit rule actually disserves these objectives. More importantly, *American Pipe* tolling was not intended to inure to the benefit of individual, private litigants. Consequently, the Fourth Circuit rule is an incorrect application and extension of *American Pipe*.

III. This Court has consistently recognized the importance of statutes of limitation as a means of protecting defendants from stale claims and assuring that faded memories and lost evidence will not unduly impair the fair disposition of lawsuits. While federal courts have the inherent power to toll the statutory period for the commencement of lawsuits, such power is used sparingly and only when consistent with legislative purpose. In the present case, Respondent Parker, having filed his own suit almost two years after his receipt of the ninety-day right-to-sue notice, then chose to intervene in the *Pendleton* class suit. Since neither the language nor the purpose of Title VII authorizes a tolling of the ninety-day period to allow Parker's belated suit, there is no basis for the tolling accorded by the present Fourth Circuit rule. Moreover, because Parker obtained the benefit of *United Airlines* tolling and became a party intervenor in the *Pendleton* case, there is no inequity in rejecting his untimely private suit.

On a larger scale, the operation of the Fourth Circuit tolling rule will have the practical effect of judicially extending statutes of repose for periods of time far beyond what legislatures have prescribed. Such extensions will be substantial and will be automatically available to all individuals who are within the scope of a civil complaint brought as a class action. Thus, the Fourth Cir-

cuit tolling rule will significantly modify a wide range of statutes and thereby intrude upon legislative prerogative.

IV. Unlike the 180-day period for filing an EEOC charge, the ninety-day period for commencing a Title VII lawsuit is a prerequisite to the jurisdiction of the court. Whereas the 180-day period is measured from the date of the wrong, and as noted in *Zipes v. Trans World Airlines*, —— U.S. ——, 102 S.Ct. 1127, 1132 (1982), is more like a statute of limitation, the ninety-day period begins to run only after the charging party/plaintiff has begun the adjudicatory process and is aware of his rights. Thus, the ninety-day period is more closely analogous to the statutory time period for obtaining federal appellate jurisdiction. Therefore, the present Fourth Circuit rule is inapplicable because the ninety-day period is jurisdictional, and not a statute of limitation.

ARGUMENT

I. THE FOURTH CIRCUIT RULE EXTENDING THE *AMERICAN PIPE* TOLLING DOCTRINE IS NOT SUPPORTED BY PRECEDENT.

The Fourth Circuit has adopted a rule under which "the pendency of a putative class action tolls the running of limitations for members of the putative class both for purposes of intervention *and the filing of a new suit* based upon a cause of action embraced within the putative class action until certification of the class is denied." (Petition for Cert. at 7a) (emphasis added). As noted in its opinion, this rule is based primarily upon the Fourth Circuit's interpretation of this Court's decision in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). Petitioner respectfully submits that the Fourth Circuit's reading of *American Pipe* is incorrect, and that the running of limitations is tolled for members of a putative class only for purposes of intervening in the proposed class suit.

A. The *American Pipe* Rule Clearly and Specifically Restricts Tolling to Timely Intervention.

In *American Pipe*, this Court considered a case involving a proposed class action antitrust suit filed by the State of Utah eleven days before the running of the statute of limitations. The trial court found that the suit could not be maintained as a class action because there was insufficient numerosity under Rule 23(a)(1) of the Federal Rules of Civil Procedure to warrant class treatment, even though the remaining prerequisites for class action [commonality, 23(a)(2); typicality, 23(a)(3); and adequacy of representation, 23(a)(4)] were apparently satisfied. Eight days after denial of class certification and after limitations had run, more than sixty local government bodies, who claimed to be members of the proposed Utah class action, moved to intervene as plaintiffs in Utah's action. However, the district court denied the intervention motion, because it determined that the limitations period under the Clayton Act had expired as to each of the local government bodies. On appeal, the Ninth Circuit reversed, concluding that permissive intervention should have been granted. *See* 414 U.S. at 541-45.

This Court affirmed the Ninth Circuit's decision and announced the controlling rule:

> [w]e hold that in this posture, at least where class action status had been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

414 U.S. at 552-53. In the subsequent case of *United Airlines, Inc. v. McDonald*, this Court reaffirmed its *American Pipe* rule restricting the application of tolling to timely intervention. 432 U.S. 385, 391-96 (1977). In

United Airlines, however, this Court found that there was a tolling of limitations even after final judgment in favor of putative class members who intervened in a Title VII sex discrimination suit, but only for the narrow purpose of appealing the denial of class certification. *Id.* Thus, this Court has clearly and consistently restricted the tolling of limitations to situations where putative class members sought to intervene in the proposed class action.

Of the circuit courts which have directly decided the question of whether *American Pipe* tolling extends to the filing of new private suits, only the Fourth Circuit, in its opinion below, has adopted such an extension. In *Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2d Cir. 1977), the Second Circuit rejected a plaintiff's effort to rely upon the tolling allowed in *American Pipe* in order to save his separate, individual suit from the bar of limitations. In refusing to extend the tolling doctrine, that court stated that "[o]f especial significance is the fact that the rule of *American Pipe* was intended for the benefit of purported members of the class who sought to *intervene* in the action after class status was denied." *Id.* at 783. (Emphasis original). Similarly, in *Stull v. Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), the Second Circuit, citing *Arneil v. Ramsey*, found that "[a]ppellant's argument that this reprieve [*American Pipe* tolling] should be extended to class members who file separate suits after the class action has been terminated and the statute of limitation has expired is completely without merit."

More recently, in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3320 (U.S. Oct. 12, 1982) (No. 82-650), the Ninth Circuit refused to apply *American Pipe* tolling for the benefit of a separate, private suit. The *Pavlak* Court reasoned that:

> [i]f a class member chooses to file an independent action, he or she may do so regardless of the pendency of the suit in which there is a motion to certify. We

> think that in this instance the plaintiff should determine either to abide by the class certification motion, and file for intervention if it fails, or, on the other hand, commence an independent suit at the outset. Thus, the potential class member can either opt out and begin his own action within the relevant limitations period, or do nothing, in which case he will be bound by the results of the litigation. If, as here, the latter course is taken and class certification is denied, principles of equity give the putative class members a chance to intervene in the suit, thereby approximating the status quo ante. These equitable principles do not extend to permit the plaintiff to take advantage of the alternative of a separate action after the limitations period has expired.

Id. at 620. Thus, there is no direct appellate support [1] for the Fourth Circuit's present rule. At the same time, there is no clear line of decision in the district courts.[2] Therefore, the weight of authority runs counter to the rule adopted by the Fourth Circuit.

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[1] Dicta in other circuit opinions may support the Fourth Circuit's extension of the *American Pipe* tolling doctrine. *See, e.g., Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1977), *vacated*, 445 U.S. 940 (1980); *Sanders v. John Nuveen & Co.*, 524 F.2d 1064, 1074 n.28 (7th Cir. 1975), *vacated on other grounds*, 425 U.S. 929 (1976). *But see, e.g., Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Jefferson v. H.K. Porter Co.*, 648 F.2d 337, 339 (5th Cir. 1981).

[2] *See, e.g., Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979) (tolling for separate suit); *Green v. United States Steel Corp.*, 481 F.Supp. 295, 299-300 (E.D. Pa. 1979) (tolling for separate suit); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978) (tolling for separate suit). *But see, e.g., Parker v. Crown, Cork & Seal Co.*, (Petition for Cert. 8a, 13a-16a) (no tolling for separate suit); *Gluck v. Amicor, Inc.*, 487 F.Supp. 608, 614-15 (S.D.N.Y. 1980) (no tolling for separate suit); *Sanders v. Faraday Laboratories, Inc.*, 82 F.R.D. 99, 103 (E.D.N.Y. 1979) (no tolling for separate suit).

B. The Authorities Relied Upon by the Fourth Circuit Do Not Support its Present Rule.

In support of its expansion of the *American Pipe* tolling doctrine to include the filing of a new suit, the Fourth Circuit relied upon a footnote in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). (Petition for Cert. at 4a-5a). That footnote stated:

> [p]etitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Eisen, 417 U.S. at 176 n.13 (1974). For the following reasons, the text of this footnote should not be viewed as authority for the present rule.

First, the language of the *Eisen* footnote should not be construed as reflecting the *American Pipe* holding. *American Pipe* plainly restricts the operation of the tolling doctrine to purported class members "who make timely motions to intervene." [3] 414 U.S. at 552-53. Indeed, the critical language in the *Eisen* footnote appears to be only

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[3] An additional constraint set forth in *American Pipe* limits tolling to cases "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable . . . .'" 414 U.S. at 552-53. In *Pendleton*, the District Court denied class certification not only for lack of numerosity, 23(a)(1), but also for lack of typicality, 23(a)(3), and for lack of adequate representation, 23(a)(4). (App. B to Petitioner's Brief at 9a-17a). A narrow reading of *American Pipe* therefore precludes Parker from obtaining the benefit of a tolling of limitations either for intervention or for the filing of his separate suit. *But see Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1095-98 (3d Cir. 1975); *McCarthy v. Kleindienst*, 562 F.2d 1269, 1272-75 (D.C. Cir. 1977).

a portion of a sentence taken from the text of the *American Pipe* opinion.[4]

Second, the particular facts and circumstances underlying the *Eisen* decision clearly demonstrate that the footnote language should not be controlling in the present case. In *Eisen*, a Rule 23(b)(3) class action was certified, and the principal issue was whether notice to the individual class members was mandatory. 417 U.S. at 173. In concluding that such notice was required, this Court also indicated that members who opt out of a certified class might, in a manner consistent with *American Pipe*, obtain the benefit of a tolling of limitations. *Id.* at 176 n.13. Thus, read in its proper context, the *Eisen* footnote does not provide support for the Fourth Circuit's extension of the *American Pipe* tolling doctrine. *See Pavlak v. Church*, 681 F.2d at 620-21.

A third reason why the *Eisen* footnote is not an authoritative basis for the Fourth Circuit's extension of the *American Pipe* tolling doctrine is the fact that *Eisen* was not even cited in this Court's subsequent decision in *United Airlines v. McDonald*, 432 U.S. 385. There can be little doubt that if the *Eisen* footnote had been meant to have the persuasive force attributed to it by the Fourth Circuit, surely it would have controlled, or at least would have been cited in support of the modest extension of

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[4] The full sentence in *American Pipe*, from which the *Eisen* footnote was apparently taken, is in turn, followed by a footnote which states:

> [t]he Advisory Committee's Note on Proposed Rule 23 observes on the issue resolved here only that the question 'whether the *intervenors* in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be decided by reference to the laws governing . . . limitations as they apply in particular contexts.' 28 U.S.C. App., n. 7767; 39 F.R.D., at 104.

American Pipe, 414 U.S. at 554 n.24 (emphasis added).

American Pipe established by a divided Court in *United Airlines*. Therefore it is submitted that the *Eisen* footnote is simply not relevant to a determination of the present issue.

In its opinion below, the Fourth Circuit suggested that *Susman v. Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980), and *In re Fine Paper Litigation*, 632 F.2d 1081 (3d Cir. 1980), "stated the tolling rule broadly enough to include new suits as well as motions to intervene in the aborted class action." (Petition for Cert. at 5a-6a). A careful examination of these cases does not indicate the support suggested by the Fourth Circuit. In *Susman*, the circuit court reversed the trial court's holding that a putative class action was moot, and noted in passing that the statute of limitations "may be tolled" for the benefit of individual members of the proposed class. 587 F.2d at 869-70. Similarly, in *Fine Paper*, the circuit court merely observed that "the statute of limitations may be tolled" during the pendency of a determination of class action status. 632 F.2d at 1087. Nothing in *Susman* or *Fine Paper* states or implies that such tolling is available to putative class members instituting their own separate suits. Thus, the Fourth Circuit's present rule lacks authoritative support in the case law.

II. THE *AMERICAN PIPE* TOLLING RULE WAS ESTABLISHED TO EFFECTUATE THE PURPOSES OF RULE 23 AND NOT TO FURTHER THE INTERESTS OF PRIVATE LITIGANTS.

There can be no question that the tolling rule adopted by the Fourth Circuit is for the singular and private advantage of individuals who, by circumstance, happen to fall within the scope of a putative class as described in a civil complaint. Under the Fourth Circuit rule, a qualifying individual automatically obtains an extension of the applicable statute of limitation for purposes of instituting his own private cause of action. However, this

benefit of tolling of limitations does nothing to advance the broad interests of the putative class from whose ranks the benefited private litigant arose. Rather, the Fourth Circuit's tolling rule has the opposite effect of undermining and weakening the putative class by facilitating and even encouraging defections through the commencement of private suits. Because the Fourth Circuit rule serves only private—as opposed to class—interests, it is important to consider this Court's underlying purpose in fashioning the *American Pipe* tolling doctrine, and then to determine whether the Fourth Circuit rule is a logical and consistent extension of that purpose.

A. The *American Pipe* Tolling Rule was Established for the Narrow Purpose of Preserving the Effectiveness of Rule 23.

In *American Pipe* the issue before this Court was whether the running of the applicable statute of limitation was tolled upon the commencement of the original class suit so that prospective members of a class, which had been denied class status, could intervene in the remaining private suit. This Court began its analysis of the issue with a review of the history of Rule 23, and in particular, its recent predecessor, the so-called "spurious" class action. Noting the serious weaknesses in that former rule, this Court observed:

> [a] recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called 'one-way

> intervention'—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.

414 U.S. at 547 (footnotes omitted). As indicated, a specific purpose of the present Rule 23 was to strengthen the class as a form of action, to eliminate abuses and to prevent the class action from becoming a device for gaining private tactical advantage. Thus, the propriety of the Fourth Circuit's tolling rule must be carefully measured for conformity with this overriding purpose.

The tolling rule adopted below provides a unique tactical advantage to those litigants fortunate enough to fall within the contours of a proposed class action. Such putative class members may "sit on the sidelines" and await developments in the case. Then, depending upon circumstances, they can either remain with the putative class, intervene, or file their own private suits. Indeed, nothing would prevent them from pursuing all three courses of action at the same time, nor would the Fourth Circuit rule prohibit privately filed suits from being dismissed and the individual litigants from reappearing as class members or intervenors. In other words, a rule which permits a tolling of the running of limitations to allow putative class members to file private suits necessarily reintroduces the same opportunities for tactical maneuvering and other abuses for individual benefit, which were noted in *American Pipe* and which the present Rule 23 was designed to prevent. *See id.* at 545-50.

In contrast to the private advantage available under the Fourth Circuit rule, nothing in *American Pipe* reflects a need to advance the private interests of the mem-

bers of a putative class. Rather, *American Pipe* strongly indicates the need to subordinate the interests of private litigants to those of the class. To this end, the Court observed:

> the tolling rule we establish here is consistent both with procedures of Rule 23 and with the proper function of the limitation statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchant . . . this interpretation of the Rule is nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve.

414 U.S. at 555-56. Moreover, the *American Pipe* Court wanted to be certain that an action brought under Rule 23 would advance the interests not only of the active class participants, but also of the class members who were unaware of the proceedings. *See id.* at 552. Plainly, the Court wanted to prevent a gradual erosion of a class action brought about by the exclusion of inactive or uninformed putative class members whose individual claims might otherwise be barred by the running of limitations. *See id.* at 551-52. Thus, in holding that the applicable statute of limitations was tolled for all purported class members who make timely motions to intervene after class certification is denied, the Court was responding to a specific problem which threatened to vitiate the purpose and effect of Rule 23. In this way, the *American Pipe* tolling rule evolved from circumstances and for purposes entirely unrelated to those which are advanced through the Fourth Circuit's rule.

In *United Airlines*, this Court reaffirmed and extended the *American Pipe* rule to permit a tolling of limitations to allow putative class members to intervene for the limited purpose of appealing a denial of class certification. 432 U.S. at 391-96. Here again, this Court responded to a circumstance where the running of limitations threatened to prevent a putative class member from interven-

ing in a case in which the named class representatives could no longer protect the proposed class.[5] *Id.* at 393-94. This Court concluded that intervention for the sole purpose of appealing the denial of class certification was consistent with and advanced the purposes of Rule 23. *See id.* This Court, however, took specific note of an argument by petitioner United Airlines that respondent McDonald was barred by limitations from intervening despite the tolling afforded under *American Pipe*. *Id.* at 391-92. In rejecting United Airline's argument, this Court observed:

> [t]his argument might be persuasive if the respondent had sought to intervene in order to join the named plaintiffs in litigating *her individual claim* based on the illegality of United's no-marriage rule, for she then would have occupied the same position as the intervenors in *American Pipe*. But the later motion to intervene in this case was for a wholly different purpose. That purpose was to obtain appellate review of the District Court's order denying class action status in the *Romasanta* lawsuit . . . .

Id. at 392 (emphasis added). Thus, this Court indicated that its tolling doctrine was to be used only to effectuate the broad purposes of Rule 23. More importantly, this Court strongly suggested that this tolling doctrine would not be applied where the purpose was to advance a private claim. *Id.*

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[5] In *United Airlines* a class action complaint alleging sex discrimination in violation of Title VII was filed in 1970 by Carole Romasanta. In 1972, the district court, concluding that the proposed *Romasanta* class did not satisfy the numerosity requirement of Rule 23(a)(1), denied class action status. Romasanta's individual claim (and the claims of several intervenors) were settled in 1974 and a judgment dismissing the *Romasanta* case was entered. Eighteen days after learning of the final judgment in *Romasanta*, respondent McDonald moved to intervene in that case for the purpose of appealing the 1972 order denying class certification. The district court denied McDonald's motion as untimely, but the Court of Appeals reversed. *See United Airlines*, 432 U.S. at 388-90.

In its opinion below, the Fourth Circuit did not closely examine the purpose behind the tolling doctrine articulated in *American Pipe* or *United Airlines*. Rather, the Fourth Circuit determined that an extension of that doctrine to benefit individual litigants was a logical outgrowth of *American Pipe*, and that to refuse such an extension would "exalt form over substance." (Petition for Cert. at 6a). In so doing, the Fourth Circuit implicitly assumed that no particular purpose is served by requiring intervention as a condition for obtaining *American Pipe* or *United Airlines* tolling of limitations. Petitioner submits that this assumption is faulty.

B. An Important Purpose is Served in Limiting the Tolling Doctrine to Putative Class Members who Intervene in the Proposed Class Action.

From the time that an action is "brought as a class action" the district court has the duty and broad authority to make appropriate orders governing the conduct of the action. 28 U.S.C. Rule 23(c) and (d); *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). Indeed, a denial of class certification does not automatically mean that the claims or potential claims of the putative class members have completely expired. *See United Airlines*, 432 U.S. at 393. Rule 23(c)(1) specifically provides that an order granting or denying class certification "may be altered or amended before the decision on the merits" and that subsequent events and circumstances may warrant class action status. Thus, unlike an individual suit, an action under Rule 23 is burdened with many unique problems[6] and lingering possibilities.

The duty to ensure that the interests of putative class members are protected necessarily devolves upon the district court judge, who is in the best position to evaluate

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[6] *E.g.*, subclasses and conflicting interests, adequacy of representation, approval of compromise or settlement and communications with prospective class members.

events and circumstances in the broad context of the proposed class action. However, under the Fourth Circuit rule, a denial of class certification is likely to trigger the filing of separate suits by the more informed and knowledgeable members of the proposed class whose opportunistic desertion of the class may be inimical or even fatal to the interests of the remaining members.[7] Indeed, the absence of any judicial control or regulation over the departure of putative members from the class and their filing of private suits is a substantial reason for limiting *American Pipe* tolling to class members seeking to intervene in the proposed class action.

The operation of the Fourth Circuit rule also runs counter to Rule 23's major purpose—economy and efficiency in litigation. *See American Pipe*, 414 U.S. at 553, 555-56. Separate suits by countless members of a failed class mean a "second wave" of litigation which may take place in multiple jurisdictions. Moreover, each such separate suit carries with it a full complement of discovery, court proceedings, and potentially inconsistent results. Thus, there can be no doubt that the operation of the Fourth Circuit rule imposes a far greater burden and expense on the parties and the judicial system than may result from even a multiplicity of motions for intervention in the *same proposed class action suit*. Therefore, the Fourth Circuit rule is inconsistent with the purposes of Rule 23, and there are clear and compelling reasons to restrict *American Pipe* tolling to intervention in the proposed class action.

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[7] The tolling rule adopted by the Fourth Circuit plainly permits putative class members to file their own private suits, thereby disengaging from the class action and the attendant controls of the class action trial judge. Whereas an individual seeking to intervene in a proposed class action must satisfy the requirements of Rule 24, the Fourth Circuit rule allows an individual to defect from the proposed class without condition or judicial scrutiny. This anomaly is difficult to justify because the potential for abuse or disservice to the class is undoubtedly greater where putative class members elect to abandon the class and pursue their own actions.

III. THE FOURTH CIRCUIT TOLLING RULE IS AN IMPROPER INCURSION UPON LEGISLATIVELY ENACTED STATUTES OF LIMITATION.

Statutes of limitation serve an important function in society by promoting "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Indeed,

> [t]hese enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979); *see United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965). Thus, statutes of limitation not only impose a duty of timely filing upon plaintiffs, but also confer a substantive right upon defendants.

A. Tolling of Limitations is Available Only When Consistent with Legislative Purpose.

Even though statutes of limitation are of considerable importance in the judicial scheme, this Court has recognized that federal courts have the inherent equitable power to determine that the running of such statutes of repose may be tolled "under certain circumstances not inconsistent with the legislative purpose." *American Pipe*, 414 U.S. at 559. In so doing, this Court set forth its authority to grant judicial exceptions to the legislative policy expressed in statutes of limitation. There can be little doubt, however, that this authority to exercise judicial power in derogation of statutory enactments must be exercised carefully and sparingly. Thus, in *United States v. Rutherford*, 442 U.S. 544, 551-52 (1979), the Court observed:

> [w]hen construing a statute so explicit in scope, a court must act within certain well-defined constraints. If a legislative purpose is expressed in 'plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms.' Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole. (Citations omitted).

The *Rutherford* Court, through Justice Marshall, also emphasized that:

> [u]nder our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. See *Anderson v. Wilson*, 289 U.S. 20, 27 (1933). Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied.

442 U.S. at 555. Therefore, to determine whether the *American Pipe* tolling doctrine should be extended to allow Parker's private suit to escape the effect of the running of the ninety-day period fixed under Title VII, it is necessary to examine the applicable statutory language, the legislative purpose and the particular circumstances of the case.

As indicated above, Parker failed to commence his private suit within the ninety-day period set forth in 42 U.S.C. § 2000e-5(f)(1). That section provides, in pertinent part, that "the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent [employer] named in the charge . . . by the person claiming to be aggrieved . . . by the alleged unlawful employment practice." *Id.* Thus, the ninety-day period for commencing a civil action is clearly set forth

in the statute. Moreover, the language of Section 2000e-5 does not provide any exception to, or provision for, the tolling of that ninety-day period. Consequently, Parker's present action is untimely.

Undeniably, Title VII serves a broad remedial purpose in combating and rectifying discrimination in the workplace. *See, e.g., Zipes v. Trans World Airlines, Inc.*, —— U.S. ——, ——, 102 S.Ct. 1127, 1135 (1982); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). With this purpose in mind, it is held that courts are to construe "with liberality" the procedural requirements of Title VII. *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978); *see Bronze Shields, Inc. v. New Jersey Dep't of Civil Service*, 667 F.2d 1074, 1081 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 3510 (1982). However, there is simply no basis to conclude that Title VII's remedial purpose or liberal construction is an all-purpose balm which cures every manner of procedural or substantive defect. In light of the fact that Congress has explicitly declared that Title VII suits be commenced within ninety days of receipt of a right-to-sue notice, it is most difficult to glean from the language of Title VII or its legislative history any support for the lengthy extension of time which the Fourth Circuit has provided to Parker.

This Court has previously considered and rejected an effort by a nonclass plaintiff to obtain a tolling of the ninety-day statutory period in order to institute a Title VII suit. In *Int'l Union of Elec., Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 231-32 (1976), a discharged employee pursued grievance arbitration procedures under her employer's collective-bargaining agreement, but failed to file a timely administrative charge of discrimination with the EEOC pursuant to 42 U.S.C. § 2000e-5(d). Consequently, her subsequent suit under Title VII was dismissed. To save her Title VII

case, the discharged employee argued that the statutory period for filing an administrative charge of discrimination with the EEOC is equitably tolled "pending completion of the grievance procedures." 429 U.S. at 237. Although this Court reversed the dismissal on other grounds, it rejected the employee's arguments for an equitable tolling. *Id.* at 236-40. The Court concluded that the statutory time limits set forth in Title VII reflect congressional purpose; therefore, they are controlling. *Id.* at 240. Even in *Zipes*, where this Court held that the 180-day period for filing an EEOC charge is not a jurisdictional prerequisite, it was carefully noted that the remedial purpose of Title VII does not negate the purpose of the 180-day filing requirement. —— U.S. at ——, 102 S.Ct. at 1135.

The particular circumstances of the present case hardly warrant a judicial tolling of limitations so that Parker may institute his separate suit nearly two years after the expiration of his ninety-day notice. Most critical is the fact that Parker made a timely motion under Rule 24(a) and (b) of the Fed. R. Civ. P. to intervene in the *Pendleton* class action for purposes of appealing the order denying class certification. By an order dated April 16, 1981, the District Court granted that motion and Parker obtained the benefit of the *United Airlines* tolling rule, and thereby became a party intervenor in the *Pendleton* case. (App. C to Petitioner's Brief at 20a). However, Parker, in his status as intervenor in the *Pendleton* case, failed to note a timely appeal of the denial of class certification. In any event, Parker made a positive election to join, and did in fact join the *Pendleton* case as a party.[8] Clearly, the equitable tolling Parker now seeks is for the exclusive purpose of enabling him to have a

[8] Since Parker has been continually represented by the same counsel who represented the class representatives in *Pendleton*, it is evident that Parker was aware of the denial of class certification in *Pendleton*. Therefore, Parker certainly could have made a timely intervention in that case and pursued his private claims as a party intervenor in accordance with *American Pipe*.

second chance to pursue his claims. It is submitted that no equitable or Title VII remedial purpose is served by adopting a rule which will enable litigants, like Parker, more than one opportunity to advance legal claims. This is particularly true where such opportunities are not uniformly available, but rather depend upon the fortuity of being a member of a proposed class described in a civil complaint.

B. The Operation of the Fourth Circuit Rule Will Substantially Undermine the Purpose and Effect of Statutes of Limitation.

The Fourth Circuit rule automatically tolls the applicable statute of limitations for all members of a putative class who are described in a civil complaint drafted by attorneys or *pro se* litigants. The nature and extent of such a proposed class, all of whose members individually benefit from an "equitable" tolling of limitations, is determined by the draftsman of the lawsuit, and not by a court. Thus, the temptation to obtain tactical advantage through misuse of the class action format and through broadly defining class membership is considerable.

The Fourth Circuit rule also does not focus upon the length, or potential length, of the tolling which may result from its operation. For example, while Rule 23(c)(1) of the Fed. R. Civ. P. directs the district court to determine "as soon as practicable" after filing whether or not a suit should be maintained as a class action, in the present case nearly two years elapsed between the filing of the complaint in *Pendleton*, and the order denying class certification in that case.[9] Thus, the workload of the court and the complexities of the class certification issues can greatly extend the period of tolling. In situations where there are successive or overlapping class ac-

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[9] The *Pendleton* suit was filed on September 15, 1978; class certification was denied in that case on September 4, 1980. (Petition for Cert. at 3a).

tions against the same defendant, tolling of limitations may continue for an extraordinary period of time. In fact, the application of the Fourth Circuit rule does not prevent a putative class member from bringing his new private suit as a class action, thereby continuing the tolling of limitations. Also, in a case where there is both a proposed plaintiff class and a proposed defendant class, the Fourth Circuit rule will create difficult problems in determining the timeliness not only of separate, private suits, but also of counterclaims and crossclaims. It is therefore submitted that the operation of the Fourth Circuit rule will cause lengthy or even indefinite tolling and thereby judicially revise legislative enactments.

IV. THE FOURTH CIRCUIT TOLLING RULE DOES NOT APPLY BECAUSE THE NINETY-DAY FILING PERIOD PRESCRIBED BY 42 U.S.C. § 2000e-5(f)(1) IS A JURISDICTIONAL PREREQUISITE AND NOT A STATUTE OF LIMITATION.

The Fourth Circuit tolling rule is inapplicable to the present case because the ninety-day filing period prescribed by 42 U.S.C. § 2000e-5(f)(1) is a jurisdictional prerequisite which should not be equitably tolled. Prior to this Court's decision in *Zipes*, —— U.S. ——, 102 S.Ct. 1127, most of the courts of appeals held that the ninety-day filing requirement was jurisdictional. *See, e.g., Archie v. Chicago Truck Drivers*, 585 F.2d 210, 214 (7th Cir. 1978); *Hinton v. CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975); *Wong v. Bon Marche*, 508 F.2d 1249, 1250-51 (9th Cir. 1975); *Genovese v. Shell Oil Co.*, 488 F.2d 84, 85 (5th Cir. 1973) [construing the prior thirty-day filing requirement of 42 U.S.C. § 2000e-5(e)]; *Goodman v. City Products Corp.*, 425 F.2d 702, 703-04 (6th Cir. 1970) [interpreting the prior thirty-day filing requirement of 42 U.S.C. § 2000e-5(e)]. In fact, this Court in dictum has referred to the ninety-day judicial filing requirement as a jurisdictional prerequisite. *See United Airlines, Inc. v. Evans*, 431 U.S.

553, 555 n.4 (1977); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

The decision in *Zipes* does not change the law with respect to this ninety-day filing requirement. In *Zipes*, the Court specifically held that the requirement that a charge be filed with the EEOC within 180 days of the discrimination "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." —— U.S. at ——, 102 S.Ct. at 1132. However, *Zipes* did not decide the same question as to the ninety-day judicial filing period [10] and, therefore, is not controlling.

Unlike the 180-day filing period which accrues from the date of the alleged discriminatory act, the ninety-day period is triggered at a point unrelated to the accrual of the cause of action. The traditional reasons for equitable tolling, such as the defendant's fraudulent concealment of the cause of action, or the plaintiff's justifiable ignorance of the claim, are virtually nonexistent at this stage. By the time the ninety-day filing period is applicable, the plaintiff is fully aware of his cause of action, has had an administrative forum in which to prosecute his claim and has been counseled as to his rights. In fact, the plaintiff has been given a written statement which clearly sets forth the deadline for filing in federal court. (J.A. 7A). Therefore, the concern *Love v. Pullman Co.*, 404 U.S. 522, 527 (1970), expressed over "technicalities [which] are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process" is less pressing at this stage.

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[10] Courts of appeals after *Zipes* have extended *Zipes* and held that the ninety-day filing period is also not jurisdictional. *See, e.g., Gordon v. National Youth Work Alliance*, 675 F.2d 356, 359-60 (D.C. Cir. 1982); *Rice v. New England College*, 676 F.2d 9, 10 (5th Cir. 1982); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1001 (11th Cir. 1982).

Petitioner maintains that the ninety-day period is more analogous to the time limitations in 28 U.S.C. § 2107 and Rule 4(a) of the Fed. R. App. P. which prescribe that notice of appeal in a civil case must be filed within thirty days of the entry of judgment or order from which the appeal is taken. This Court has held that "[t]his 30-day time limit is 'mandatory and jurisdictional.'" *Browder v. Director, Dep't of Corrections of Illinois*, 434 U.S. 257, 264 (1978); *see also United States v. Robinson*, 361 U.S. 220, 229 (1960); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943).

Congress clearly intended that the EEOC be the primary forum for investigating, conciliating and remedying Title VII violations. *See* S. Rep. No. 92-415, 92d Cong., 1st Sess. 23 (1971). Therefore, since an individual has had an opportunity to seek relief through this administrative process, the ninety-day time period for filing a federal suit, like an appeal, arises after the individual has begun the adjudicatory process, and is in no way tied to the accrual of the underlying cause of action. It is therefore submitted that the nature and extent of the tolling accorded to Parker under the Fourth Circuit rule is wholly incompatible with the jurisdictional character of the ninety-day filing requirement of Title VII.

CONCLUSION

The Judgment of the Court of Appeals for the Fourth Circuit (J.A. 13A) reversing and remanding the summary judgment of the District Court (J.A. 12A), should be reversed.

Respectfully submitted,

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December, 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. K-78-1734

RANDY PENDLETON and MARVIN ALLEN,
on behalf of themselves and all others similarly situated
Plaintiffs

vs.

CROWN, CORK & SEAL COMPANY, INC.
Defendant

COMPLAINT

Preliminary Statement

1. This is an action for declaratory, injunctive and other relief to redress the deprivation of rights secured to the plaintiffs by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, et seq.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343. This action is authorized and instituted pursuant to 42 U.S.C. § 2000e, et seq. The unlawful employment practices herein were and are being committed within the District of Maryland.

PARTIES

3. Plaintiffs, Marvin Allen and Randy Pendleton are black citizens of the United States and residents of Baltimore, Maryland.

4. Defendant Crown, Cork & Seal Company, Inc. is a New York corporation doing business in the State of Maryland where it is engaged in manufacturing cans,

closures and machinery and related activities in interstate commerce throughout the State of Maryland.

DEFINITION OF CLASS

5. Plaintiffs bring this action on their own behalf and on behalf of others similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of black persons who have been, continue to be and who in the future will be denied equal employment opportunities by defendant on the grounds of race or color, in violation of Title VII of the Civil Rights Act of 1964. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claim or defenses of plaintiffs will adequately protect the interest of the class. Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive or declaratory relief with respect to the class as a whole.

6. This is a proceeding for a declaratory judgment as to plaintiffs' rights, or their class rights and a preliminary and permanent injunction enjoining defendant from maintaining policies and practices of discriminating against plaintiffs and their class because of their race or color.

STATEMENT OF CLAIMS

7. Defendant Crown, Cork & Seal, Co., Inc. discriminates against blacks as a class with regard to terminations, hiring, job assignments, promotions, disciplinary actions, harassment, on-the-job training, and retaliation because they seek to enforce their civil rights, and, terms and conditions of employment.

8. Defendant has discriminated against Plaintiff Marvin Allen on the basis of his race in the following ways:

a. Plaintiff was hired by defendant in or around August, 1973;

b. Plaintiff was hired as an End Wrapper (Labor grade 6).

c. After being employed by the defendant for approximately three or four months, plaintiff noticed that defendant engaged in certain racially discriminatory employment practices and he filed a charge of discrimination with the Maryland Commission on Human Relations on 10-31-73 alleging that defendant discriminates against blacks on the basis of their race with regard to hiring, job training, promotions, terminations and terms and conditions of employment.

d. After plaintiff filed his initial charge of discrimination, the defendant retaliated against him by subjecting him to harsher disciplinary action than it subjected white employees for the same, similar or worse violations of company rules.

e. Plaintiff noticed that racial slurs, threats and abuses were written on the walls of the locker rooms and lavatories. Prior to the filing of his charge of discrimination with the Maryland Commission on Human Relations, plaintiff complained to defendant's management personnel on numerous occasions.

f. On one occasion, plaintiff was threatened by a fellow white employee with a revolver while he was under the influence of an intoxicant. The white employee was made to apologize to the plaintiff and given five days off after working the preceding weekend on overtime.

g. Shortly thereafter, plaintiff was terminated for being late returning from his lunch break. Plaintiff's termination was because of his race and in retaliation against him because he filed a charge of discrimination against the defendant.

9. Defendant terminates black employees because of their race. For the period July, 1973-April, 1975, defendant terminated forty-four (44) persons; seventy-five percent (75%) of those persons were black, yet, on the average, blacks only made up ten percent (10%) of defendant's workforce.

10. Defendant discriminated against blacks with regard to hiring in that its plant is located in the Baltimore Standard Metropolitan Statistical Area (SMSA) where approximately 22% of the experienced workforce is black, and, blacks only comprised 10% of its average workforce for the period July, 1973 to April, 1975.

11. Defendant discriminates against blacks with regard to on-the-job training and then discharges them when they fail to progress at a rate similar to white employees who have not been discriminated against with regard to on-the-job training.

12. Defendant discriminates against blacks with regard to job assignments and promotions in that black employees are assigned to lower paid, unskilled, jobs and excluded from higher paid skilled hourly positions and supervisory positions.

13. Defendant has no specific guidelines or standards to determine: a. whether a probationary employee's performance is satisfactory, b. whether an employee should be disciplined and the type of discipline. These determinations are left up to the subject judgment of an all white supervisory workforce unfettered by objective standards. This type of subjudgment has resulted in a disparate impact on black employees.

14. After hiring Plaintiff Randy Pendleton on October 2, 1973, defendant discriminated against him on the basis of his race with regard to on-the-job training and terminated him on October 6, 1973 on the basis of his race when his performance, based on the subjective

judgment of his supervisor, was alleged to be non-satisfactory.

15. Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for backpay, injunctive and a declaratory relief is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from defendant's unlawful policies and practices as set forth herein, unless enjoined by this Honorable Court.

16. As a direct and proximate result of the wrongful acts of the defendant alleged herein, plaintiffs and their class have suffered actual damages and economic losses, back pay, and other fringe benefits.

AGENCY COMPLIANCE

17. Plaintiff Randy Pendleton filed a timely charge of discrimination with EEOC and the Maryland Commission on Human Relations against the defendant alleging that he had been terminated by it because of his race, and, he received a "Notice of Right to Sue" from EEOC dated July 18, 1978 (copies attached). Reasonable cause was found to believe plaintiff was discriminated against.

18. Plaintiff Marvin Allen filed charges of discrimination with the Maryland Commission on Human Relations and EEOC alleging that defendant discriminates against blacks because of their race with regard to hiring, job training, promotions, terminations and terms and conditions of employment. Plaintiff Allen further charged defendant with retaliating against him because he filed charges of discrimination against it. He received a Notice of Right to Sue from EEOC dated June 19, 1978 (copies attached).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and the class they represent respectfully pray that this Court:

1. Grant plaintiffs and the class they represent a declaratory judgment that the actions of defendant complained of herein, violate the rights of plaintiffs and the class they represent guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*;

2. Grant plaintiffs and the class they represent a preliminary and permanent injunction prohibiting the defendant, its agents, successors, employees, attorneys and those acting in concert with it from engaging in the policies and practices complained of herein in violation of Title VII of the 1964 Civil Rights Act;

3. Grant plaintiffs and the class they represent such other and further relief as may be necessary and proper, including promotions, reinstatement and back pay to the plaintiff and the member of the class shown to be entitled to such relief;

4. Award plaintiffs and the class they represent the costs of this action, together with reasonable attorneys' fees as provided in § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (5) (k).

Respectfully submitted,

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-78-1734

RANDY PENDLETON and MARVIN ALLEN,
on behalf of themselves and all others similarly situated,
Plaintiffs

vs.

CROWN, CORK & SEAL COMPANY, INC.,
Defendant

MEMORANDUM AND ORDER

Plaintiffs filed this suit on September 18, 1978, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging racially discriminatory employment practices by defendant company. After substantial discovery, plaintiffs moved to certify this case as a class action under Rule 23(b)(2), F.R.Civ.P. Plaintiff Pendleton requested that he be permitted to represent a class of black employees who, on or after January 12, 1973, could have filed a charge of racially discriminatory termination. Plaintiff Allen sought to represent a class of black employees who, on or after March 31, 1973, could have filed charges of racially discriminatory termination, job assignment, retaliation and harassment.

On July 13, 1979, this court held a hearing and ruled on some, but not all, of the class certification issues. Since over a year has passed since the hearing, the court has decided to reiterate its previous rulings as well as now rule on the questions reserved.

I. RULE 23 REQUIREMENTS

In *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405-06 (1977), the Supreme Court dispelled authori-

tatively any notion that Title VII cases were to be treated necessarily as class actions; they must meet all the requirements of Rule 23 in order to justify class certification. *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1312 (4th Cir. 1978).

Subdivision (a) of Rule 23 establishes prerequisites to the maintenance of any class action: the putative class must be so numerous as to make joinder of all members impracticable; there must be questions of law or fact common to the class; the claims of the representative parties concerning the issues must be typical of the class; and there must be assurance that the representatives will adequately pursue and protect the class interests. These requirements are mandatory, and the moving party bears the burden of establishing that a class exists as well as of showing who would be included in the class. *Doctor v. Seaboard Coast Line R. Co.*, 540 F.2d 699, 706-07 (4th Cir. 1976); *Poindexter v. Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972).

The timely filing of a Title VII discrimination charge with the appropriate agency is a prerequisite to a private federal court action. *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1329 (4th Cir. 1976). In addition, the scope of the judicial complaint is limited to the allegations contained in the charge itself and those that are developed in the course of a reasonable administrative investigation of that charge. *King v. Seaboard Coast Line R. Co.*, 538 F.2d 581, 583 (4th Cir. 1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465-66 (5th Cir. 1970). This rule was established to accommodate conflicting statutory policies: Title VII's remedial goal of protecting those least able to assert their rights and the Act's conciliation mechanism designed to resolve differences through settlement rather than litigation. *See Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. 1184, 1188-89 (D.Md. 1977).

II. PLAINTIFF PENDLETON

Plaintiff Pendleton's motion to represent *all* black employees terminated on or after January 12, 1973, was denied at the hearing of July 13, 1979, for two reasons: his claims were not typical of those of the putative class and he was an inadequate class representative.

The facts relied on by the court in reaching this determination are undisputed. Pendleton was employed by defendant for only four and one-half days (October 2, 1973-October 6, 1973). Thus, under Article XI, Section Six of the collective bargaining agreement between defendant and its plant union, Pendleton was a *probationary* employee rather than one with seniority rights. (Paper No. 51, Exhibit A). As a probationary employee, Pendleton's claims cannot reasonably be said to be typical of those of defendant's "permanent" employees, for he does not "possess the same interests and suffer the same injury as the class members [he seeks] to represent." *Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 101 (4th Cir.), *cert. denied*, 100 S.Ct. 271 (1979). With respect to adequacy of representation, Pendleton's inappropriateness as a class representative is equally apparent. There is simply an insufficient nexus between his interests as a probationary employee and those of black employees with seniority rights under the collective bargaining agreement. *See Gibson v. Local 40 Super Cargoes and Checkers, ILWU*, 543 F.2d 1259, 1264-65 (9th Cir. 1976).

The question whether Pendleton could represent a class of black probationary employees was reserved at the close of the July 13, 1979, hearing. The parties have submitted additional memoranda and the issue is ready for determination.

Upon reviewing the materials filed by the parties and the evidence adduced at the hearing, the court concludes that class certification regarding Pendleton should be denied because plaintiffs have failed to satisfy their burden as to numerosity and adequacy of representation.

Plaintiffs, in their supplemental memorandum (Paper No. 53), list thirty-four (34) black probationary employees they identify as members of Pendleton's proposed class. No supporting documentation was provided. Defendant's supplemental memorandum (Paper No. 54), contends that twenty (20) is the correct maximum number of putative class members. In contrast to plaintiffs' scanty showing, defendant has supported its calculation with extensive documentation that plaintiffs have not attempted to refute. Thus, based on all materials of record, the court finds that twenty (20) is the maximum number of Pendleton's proposed class.

In addressing the numerosity issue, the court is mindful of the Fourth Circuit's comments in *Kelly v. Norfolk & Western Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978).

> "There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied. The issue is one primarily for the District Court, to be resolved in light of the facts and circumstances of the particular case."

Thus, federal decisions granting or denying class certification on the basis of specific numbers are of little guidance. *See* cases collected in 3B *Moore's Federal Practice* ¶ 23.05 [1] (1979 & 1979-1980 Cum. Supp.). The number of putative class members must be linked to whether, under the circumstances of the case, the moving party has demonstrated that joinder is indeed impracticable. *Kelly v. Norfolk & Western Ry. Co.*, 584 F.2d at 35; *Wilburn v. Steamship Trade Assn. of Baltimore, Inc.*, 376 F. Supp. 1228, 1233 (D. Md. 1974).

Here, twenty (20) is the upper limit of plaintiffs' proposed class. Although this is arguably a sufficient number in general, plaintiffs have not shown why it would be impracticable to join any of the potential litigants who wished to intervene. Moreover, defendant has submitted information drawn from the personnel cards of the indi-

viduals listed in plaintiffs' memorandum indicating that all proposed class members live in the Baltimore City area. (Paper No. 54, Exhibit C). This information has not been challenged by plaintiffs. In light of plaintiffs' failure to produce persuasive evidence of any nature demonstrating the impracticability of joinder of the twenty (20) putative class members, the court finds that they have not carried their burden respecting numerosity.

The "adequacy" requirement of Rule 23 is perhaps its most important prerequisite because any judgment in this type of class action would bind absent class members. *See, e.g., Linder v. Litton Systems, Inc.*, 81 F.R.D. 14, 19 (D.Md. 1978); *Gill v. Monroe County Dept. of Social Services*, 79 F.R.D. 316, 326-27 (W.D.N.Y. 1978); *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 23, 42-44 (N.D. Cal. 1977). *See generally Hansberry v Lee*, 311 U.S. 32, 41-42 (1940). Since the adequacy of a particular plaintiff is essentially a factual determination, the court has reviewed extensively the deposition of Pendleton taken by defendant on January 23, 1979. (Paper No. 37).

Pendleton was employed by defendant for only four and one-half days, nearly seven years ago. The court recognizes, however, that no terminated probationary employee could be expected to have acquired detailed information concerning defendant's practices and operations. Nevertheless, Pendleton's deposition makes it abundantly clear that he is wholly unfamiliar with the employment situation at defendant's plant and had virtually no contact with the members of the proposed class. A few examples underline vividly Pendleton's inadequacy as a class representative for even probationary employees: he did not know the name of the plant union and was not aware of the provisions of the collective bargaining agreement (Paper No. 37 at 90-91); he was not familiar with the grievance system (Paper No. 37 at 92); he had no knowledge of defendant's layoff system, attendance rules, bidding procedures, seniority system or sick leave procedures

(Paper No. 37 at 93-94); he had no knowledge of defendant's disciplinary system or suspension and discharge procedures (Paper No. 37 at 95-96); aside from a brief conversation with plaintiff Allen, he never communicated with any other black or minority employees or union representatives (Paper No. 37 at 96-101). Outside of conclusory statements in their motion for class certification, plaintiffs have not put forth concrete reasons as to why Pendleton would be an adequate representative.

In light of Pendleton's attenuated ties to the employment setting, *see, e.g., Consor v. Occidental Life Insurance Co.*, 19 E.P.D. ¶ 9162 at 7029-30 (N.D. Tex. 1979); *Rosendaul v. Garrett Freight Lines, Inc.*, 19 E.P.D. ¶ 9119 at 6826 (D. Idaho 1979); *Linder v. Litton Systems, Inc.*, 81 F.R.D. at 19-22; *Greene v. Brown*, 451 F. Supp. 1266, 1275 (E.D. Va. 1978), the court finds that Pendleton is not an adequate class representative.

III. PLAINTIFF ALLEN

At the close of the hearing on July 13, 1979, the court denied Allen's motion to represent a class of black employees on the issues of termination, job assignment, and retaliation. The question whether Allen could represent a class on the issue of harassment was reserved. Plaintiffs have filed a motion for reconsideration on the issue of termination and defendant has filed a response.

A. *Job Assignment*

In denying class certification on this issue, the court found that not only had Allen failed to file a specific administrative charge relating to job assignment but also that he was not, at the time of hiring, qualified for a skilled position at defendant's plant. Even assuming that the issue of job assignment is properly before this court, *see King v. Seaboard Coast Line R. Co.*, 538 F.2d at 583; *Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. at 1187-89,

1133, Allen admitted in his testimony at the hearing of July 13, 1979, that he was not qualified to be hired for a skilled job. Moreover, although there is some dispute as to whether Allen was "promised" to be given a skilled job at some future time, it is undisputed that Allen never requested a specific job either orally or in his application papers. *See Queen v. Dresser Industries, Inc.*, 456 F. Supp. 257, 263 (D. Md. 1978), *aff'd* 609 F.2d 509 (4th Cir. 1979).

Allen further contended that he was discriminated against with respect to job training for skilled jobs. The evidence of record, however, shows that such training was governed by the collective bargaining agreement between defendant and its plant union. Under that agreement when there were openings for skilled jobs, defendant was required to post the jobs for bidding by employees with seniority rights. Only if no such qualified employee could be found was defendant permitted to offer the job to others. Yet, while Allen testified that he was aware of the posting procedure he offered no evidence indicating that he ever requested a posted skilled job. In light of the above, the court concluded that Allen's claims were not typical of the class he sought to represent and that, in any event, he would be an inadequate class representative. *East Texas Motor Freight v. Rodriguez*, 431 U.S. at 403-04.

B. *Retaliation*

The court also denied Allen's motion to represent a class of black employees on the issue of retaliation. Claims under 42 U.S.C. § 2000e-3(a) are generally personal in nature. They do not lend themselves readily to class treatment since they usually involve facts and circumstances unique to the claim of the person against whom the retaliation is directed.

The basis of Allen's retaliation claim involves his amended EEOC complaint of September 3, 1974, in which

he alleged that he was dealt with more harshly than a white employee upon his returning to work late from lunch. The next day, September 4, 1974, Allen was terminated. Even assuming that Allen will himself be able to show the filing of an EEOC complaint and the subsequent, causally related termination, plaintiffs have made no showing that there exists a class of black employees similarly aggrieved. Thus, plaintiffs failed to carry their burden regarding numerosity and typicality, and class certification was properly denied.

C. *Termination*

In his October 31, 1973, charge filed with the Maryland Commission on Human Relations (MCHR), Allen complained of discriminatory termination policies by defendant. Such a charge, however, was premature because Allen was not terminated until September 4, 1974. At the close of the hearing on July 13, 1979, the court denied plaintiffs' motion for class certification on the issue of termination, finding that Allen's claim was at best part of his reprisal claim because he did not file an administrative charge of discriminatory termination subsequent to his firing on September 4, 1974.

Plaintiffs advance three arguments in support of their motion for reconsideration. First, plaintiffs contend that Allen's EEOC affidavit of April 7, 1975, constitutes an amendment to his earlier charges. Second, plaintiffs assert that a reasonable EEOC investigation of the allegations contained in his earlier charges would have revealed a discriminatory termination claim. Finally, plaintiffs contend that Allen should be able to raise the termination issue in this proceeding under a "like and related" theory because there was no EEOC investigation of the earlier charges.

In support of their first contention, that Allen's EEOC affidavit of April 7, 1975, constitutes an "amendment," plaintiffs cite several cases in this District for the prop-

osition that letters from claimants to the EEOC may constitute legally sufficient administrative charges. The court has no quarrel with this general proposition, but the cases relied on by plaintiffs do not support their instant theory. In *EEOC v. Fidelity & Guaranty Co.*, 420 F. Supp. 244, 248 (D. Md. 1976), Judge Murray ruled that an unsworn letter constituted a timely filed charge because it "clearly identified the parties and described the practices complained of." Similarly, in *EEOC v. Raymond Metal Products Co.*, 385 F. Supp. 907, 913 (D. Md. 1974), Chief Judge Northrop ruled that the plaintiff's letters were "sufficiently precise to constitute an initial filing of the charge." At issue in both those cases was primarily whether the EEOC's jurisdiction had been invoked within the statutory period.

The instant case does not concern whether Allen filed a charge within the limitations period. Rather, plaintiffs' contention is that Allen's EEOC affidavit of April 7, 1975, should be construed as an amendment to his earlier charges and therefore bring the issue of termination within the scope of the administrative proceeding.

Having carefully reviewed this affidavit and having given it a liberal construction, the court concludes that it does not constitute an amendment to Allen's earlier charges such that the issue of termination is properly before the court. The word "termination" is mentioned only once and in the context of Allen's recollection of what his supervisor said the penalty would be for his late return to work on August 24, 1974. Nowhere in the affidavit does Allen state that he was the subject of a discriminatory termination or that others were so discriminated against. Also supportive of this conclusion is the fact that the EEOC did not treat Allen's affidavit as a charge. While defendant was served with notice of Allen's charges of October 31, 1973, and September 3, 1974, the EEOC did not notify defendant of the affidavit. (Paper No. 57, Exhibits A & B).

Plaintiffs' second contention is that even if Allen did not file a charge of discriminatory termination, an EEOC investigation of his earlier charges would have disclosed such discrimination. In support of this assertion, plaintiffs rely on *EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976). In that case the court held:

> "[T]he original charge is sufficient to support an action by the EEOC as well as a civil suit under the Act for any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge, provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act."

Id. at 366 (footnote omitted).

As the above quoted language indicates, plaintiffs' reliance on *EEOC v. General Electric Co., supra*, is misplaced. No showing has been made that an EEOC investigation revealed a claim of discriminatory termination or that one was the subject of conciliation.

Plaintiffs' final argument is that because there was no EEOC investigation, plaintiffs should be able to raise discriminatory termination as a "like and related" claim along with those asserted in Allen's charges of October 31, 1973, and September 3, 1974. The contention that there was no EEOC investigation is unsupported and simply does not square with the evidence of record. Defendant has submitted letters, one from EEOC dated October 3, 1974, indicating plainly that an administrative investigation of Allen's charges would be instituted (Paper No. 57, Exhibits C & D). Plaintiffs have submitted nothing to refute this evidence.

In sum, the court concludes that Allen may not represent a class of black employees on the issue of discriminatory termination. Plaintiffs have not only failed to satisfy the Rule 23 requirements of numerosity and typicality on this issue, but have also not demonstrated that the termination issue is properly before the court.

D. *Harassment*

At the close of the hearing on July 13, 1979, the court reserved its ruling on whether Allen could represent a class of black employees on the issue of harassment. Based on Allen's charges of October 31, 1973, and September 3, 1974, the court concludes that they can fairly be read as harassment charges, although classified as reprisal charges by the EEOC, and shall treat them as such for the purposes of this motion.

Allen's harassment claim is twofold: he claims to have been treated more harshly because of his race and because he has filed charges with MCHR and the EEOC. After reviewing the record and the evidence at the hearing, the court concludes that plaintiffs have failed to carry their burden under Rule 23(a). Except for some nonspecific allegations in Allen's EEOC affidavit of April 7, 1975, plaintiffs have produced little suggesting the existence of a class so numerous that joinder is impracticable. In addition, plaintiffs have not demonstrated that Allen's harassment claims are typical of claims held by the putative class. *Doctor v. Seaboard Coast Line R. Co.*, 540 F.2d at 706-07.

It is, therefore, this 4th day of September, 1980, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiffs' motion for class certification is DENIED.

2. That plaintiffs' motion for reconsideration of the court's denial of class certification is DENIED.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-78-1734

RANDY PENDLETON and MARVIN ALLEN

v.

CROWN, CORK & SEAL CO., INC.

MEMORANDUM AND ORDER

Theodore Parker has moved to intervene in this case, pursuant to Rule 24, Fed. R. Civ. P., for the purpose of appealing the court's denial of the class certification motion filed by the named plaintiffs. The defendant, Crown, Cork & Seal Co., Inc. (Crown), has filed a memorandum opposing Parker's motion. Having reviewed the parties' memoranda, as well as the record in this case, the court concludes that no hearing is necessary, Local Rule 6(E), and that Parker's motion should be granted.

Plaintiffs Pendleton and Allen filed their complaint in this case on September 15, 1978, as a class action, alleging discriminatory employment practices by Crown in violation of Title VII. After substantial discovery, the plaintiffs filed a motion for class certification. On July 13, 1979, the court held a hearing and ruled on some, but not all, of the class certification issues. At the close of the July 13, 1979 hearing, the court denied plaintiff Pendleton's motion to represent a class of all black employees terminated on or after January 12, 1973. The court also denied plaintiff Allen's motion to represent a class of black employees on the issues of termination, job assignment, and retaliation. By Memorandum and Order dated September 4, 1980, the court reiterated its prior rulings and denied plaintiff Pendleton's motion to represent black probationary em-

ployees on the issue of termination, and denied plaintiff Allen's motion to represent a class of black employees on the issue of harassment.

On October 28, 1980, Parker filed an individual Title VII action alleging racially discriminatory job assignments, promotions and layoffs by defendant Crown. *See Theodore Parker v. Crown, Cork & Seal Co., Inc.*, Civil Action No. M-80-2839. On February 26, 1981, a settlement was reached between Crown and the named plaintiffs, and the court ordered this case dismissed with prejudice. On March 30, 1981, Parker filed his motion to intervene for the purpose of appealing the denial of class certification in this case.

In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392-96 (1977), the Supreme Court held that when a member of a putative class files a motion to intervene after judgment in order to obtain appellate review of a District Court order denying class certification, the motion is timely if it is filed within the time allowed by Rule 4(a), Fed. R. App. P., for filing a notice of appeal.

An examination of the allegations in Parker's protective lawsuit indicates that he was a member of several of the classes proposed by the named plaintiffs. Final judgment was entered on February 26, 1981, when the court approved the settlement between Crown and the named plaintiffs and dismissed the case with prejudice. Since Parker's motion to intervene was filed on March 30, 1981, it is timely under Rule 4(a), Fed. R. App. P. *See* Rule 26(a), Fed. R. App. P. (computation of time).

Defendant contends, however, that Parker is somehow estopped or without standing to seek appellate review of the denial of class status because he has filed his own Title VII suit. The court disagrees. Parker's protective lawsuit was filed *after* the court's Memorandum and Order of September 4, 1980, disposing finally of all class certification issues. In addition, there is no formal "opt out"

provision under Rule 23(b)(2), the present type of case, as there is under Rule 23(b)(3). Moreover, the position taken by Crown is contrary to the policy considerations outlined in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).

Although the court considers Parker's prospective appeal to be wholly without merit, under the rule established in *McDonald*, Parker's motion is timely and, therefore, must be granted.

Accordingly, it is this 16th day of April, 1981, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion of Theodore Parker to intervene in this action for the purpose of appealing this court's denial of class certification is GRANTED.

2. The Clerk shall forward a copy of this Memorandum and Order to counsel for the parties.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,
v.
THEODORE PARKER.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether equitable tolling principles, which suspend the running of statutes of limitations for class members' individual claims during the pendency of a putative class action embracing those claims, permit class members only to intervene but not to file separate suits once class certification has been denied or revoked in that action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-118

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Theodore Parker, a black male, was discharged by petitioner Crown, Cork & Seal Company, Inc. (hereinafter "Crown") on July 15, 1977. On October 3, 1977, he filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging racially motivated harassment and discharge. While that charge was pending before the

Commission, on September 18, 1978 two other black employees who also had been discharged by Crown, Pendleton and Allen, filed a Title VII action in the United States District Court for the District of Maryland on their own behalf and on behalf of all similarly situated black persons. (*Pendleton v. Crown, Cork & Seal Company*, Civ. No. M-78-1734 (D. Md.).) Their complaint specifically included an allegation that Crown discriminated against blacks as a class with regard to, *inter alia*, terminations, job assignments, and promotions.

On November 9, 1978 the EEOC disposed of Parker's charge. It made a finding of no probable cause and sent Parker a Notice of Right to Sue. Parker consulted and retained the same attorney who was representing Pendleton and Allen in the putative class action filed the previous month but did not immediately file suit against Crown.

On May 31, 1979 the *Pendleton* plaintiffs moved, pursuant to F.R. Civ. P. 23(b)(2), to certify a class consisting of all black persons subjected to racially discriminatory practices by Crown on or after March 31, 1973. This motion was denied and reconsideration also denied by the district court on September 4, 1980, on various grounds,[1] includ-

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[1] The district court found, *inter alia*, that:

(1) Plaintiff Pendleton could not represent all black employees, because he was a probationary employee and therefore an inadequate class representative (Pet. Br. App. 9a);

(2) Plaintiff Allen was an inadequate class representative, because he had never filed a complaint of discriminatory discharge with the EEOC. (Although Allen had filed a charge with the Maryland Commission on Human Rights complaining of Crown's discriminatory termination policies, this occurred before Allen himself was actually discharged by Crown, and the district court ruled that Allen's subsequent submission of an affidavit which mentioned termination to the EEOC after his charge had been referred to the federal agency by the Maryland Commission on Human Rights could

ing inadequate class representation, lack of numerosity and lack of typicality.[2]

On October 27, 1980 (less than 90 days after the denial of class certification in the *Pendleton* case), Parker filed this individual Title VII action and on January 6, 1981 moved to consolidate the case with the *Pendleton* proceedings. Crown opposed consolidation.[3] On March 27, 1981 Crown moved for summary judgment in Parker's case on the theory that the lawsuit was untimely, inasmuch as nearly two years had passed since the EEOC sent Parker a 90-day notice of his right to bring suit. Crown admitted that the pendency of the putative *Pendleton*

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not be construed as an amendment of the original charge) (Pet. Br. App. 14a-15a);

(3) The court could not certify a class of employees who had allegedly been racially harassed by Crown because of plaintiffs' failure to demonstrate that this class was so numerous that joinder was impracticable (Pet. Br. App. 17a).

None of these conclusions are involved in the present controversy before this Court.

[2] F.R. Civ. P. 23(a) states as follows:

> *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[3] The individual claims of Pendleton and Allen were ultimately settled and on February 26, 1981 a stipulated order of dismissal with prejudice was issued by the district court in *Pendleton*. Thereafter, Parker sought and was granted leave to intervene in the *Pendleton* suit for the purpose of appealing the denial of class certification (Pet. Br. App. 18a-20a; *see United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977)) but his appeal to the Fourth Circuit was dismissed on July 17, 1981 as untimely (J.A. 2A).

class action tolled the running of the time limits within which Parker (a member of the putative class) could have *intervened* in *Pendleton*, until final denial of class certification on September 4, 1980. Nevertheless, it maintained, the tolling principle did not apply to the institution of a separate Title VII action by Parker within 90 days of the ruling against certification in *Pendleton*.[4]

The district court agreed and granted Crown's motion for summary judgment. It recognized that in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), this Court applied equitable principles of "tolling" to allow intervention by a putative class member after denial of certification in the putative class action, and long after the applicable statue of limitations would otherwise have run. However, the district court limited *American Pipe* to its facts and refused to apply the same tolling principles where the putative class member files a separate action, rather than intervening.

On Parker's appeal, the Fourth Circuit reversed. 677 F.2d 391. The Court of Appeals believed that the rationale of *American Pipe* is not limited to intervention. It noted the suggestion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) (a decision requiring individual notice to all class members prior to certification in in an F.R. Civ. P. 23(b)(3) case) that the statute of limitations would be tolled in accord with *American Pipe* for all class members who desired to opt out of the class action. The court below also reasoned that the purpose of a statute of limitations, to put a defendant on notice

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[4] Crown relied on two Second Circuit decisions adopting this narrow view of this Court's decision in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974). *See Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2d Cir. 1977); *Stull v. Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), discussed *infra* at pp. 14-16.

of a claim with reasonable promptness, is fulfilled where an individual plaintiff's complaint is within the scope of a putative class action, since the defendant will have sufficient information within the statutory period concerning the nature and scope of prospective litigation. The Court of Appeals further observed that intervention may often be denied in the discretion of the district court[5] and for this reason, limiting *American Pipe* only to intervention might produce the inequitable result of allowing some putative members of the class to obtain an adjudication of their claims while excluding others who seek adjudication at the same time. For these reasons, the Court of Appeals concluded that the statute of limitations is tolled for the purposes either of intervention or of filing a new suit based upon a cause of action embraced within a putative class action.

SUMMARY OF ARGUMENT

The equitable tolling principles applied by this Court in *American Pipe* govern this case, even though the individual member of the putative class filed a separate suit after denial of class certification rather than seeking to intervene in the original litigation. For a variety of reasons, wholly unrelated to the matter of tolling, intervention may be unavailable, inappropriate or undesirable to protect the rights of the class member whose individual claim accrues during the pendency of a putative class suit. Hence, if class members are limited to intervention in the original case in order to obtain the benefits of tolling, the *American Pipe* doctrine will fail to achieve its purpose of discouraging premature interventions or filings of separate suits before the resolution of the certification issue in the putative class action.

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[5] *See* F.R. Civ. P. 24(b).

The facts of this case demonstrate the wisdom of permitting an individual suit by a class member after denial of certification. It was completely proper for Parker to rely upon the *Pendleton* suit plaintiffs to protect his rights as a class member until the ruling against certification. Thereafter, the company opposed consolidation of this case with *Pendleton* on grounds which it could also have raised in opposition to any attempt by Parker to intervene. Unless the attorney for an individual claimant who is also a member of a putative plaintiff class knows that he will be able to protect his client's rights by filing a separate suit after certification is denied or withdrawn, instead of having to rely upon discretionary intervention, he will be compelled to prosecute a separate case as soon as the claim accrues, thus vitiating the *American Pipe* rule and eliminating the class action advantages of judicial economy and efficiency.

Tolling the statute of limitations whether the individual class member seeks to intervene or to file a separate suit after denial of certification is not inconsistent with the purposes of limitations periods. There is no dispute in this case, and the trial court explicitly found, that Parker was a member of the putative class on whose behalf the *Pendleton* litigation was brought. Therefore, the defendant had ample and timely notice when *Pendleton* was initiated of the substantive claims being raised and of "the number and generic identities of the potential plaintiffs [including Theodore Parker] who may participate in the judgment," *American Pipe*, 414 U.S. at 554. The purpose of the limitations period was satisfied.

Finally, Crown's remaining claims, that tolling is unavailable in the absence of explicit statutory authorization, and that the 90-day period for filing suit under Title VII is a "jurisdictional prerequisite" rather than a statute of limitations, are without merit.

ARGUMENT

THE PENDENCY OF A PUTATIVE CLASS ACTION TOLLS THE RUNNING OF THE STATUTE OF LIMITATIONS FOR INDIVIDUAL CLAIMS OF MEMBERS OF THE PUTATIVE CLASS FROM THE TIME THE ACTION IS COMMENCED UNTIL DENIAL OF CLASS CERTIFICATION

Introduction

In this case the Court must decide whether respondent Parker has lost the opportunity to redress his claims of unlawful employment discrimination by petitioner Crown because of a procedural abyss created by the decision in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974). No language in *American Pipe* explicitly limits the equitable tolling doctrine which the Court there enunciated to cases in which intervention is sought after denial of class certification or announces that tolling is unavailable when a separate action is commenced following the refusal to certify. That differing results have been reached by Courts of Appeals emphasizes the reasonableness of Parker's belief that *American Pipe* tolling principles apply to new suits as well as interventions. Yet, if Crown is correct, the *American Pipe* decision (intended to facilitate efficient litigation and to protect class members from loss of their claims) set a procedural trap which will serve, in this and other cases, to defeat potentially meritorious claims.

That result would be particularly ironic in this case. Crown concedes that under *American Pipe*, Parker could have waited until after class certification was denied in the *Pendleton* case before intervening but argues that the same principle does not apply to Parker's decision to commence a separate Title VII action. Yet Crown *opposed* consolidation of Parker's claims with those of Pendleton and Allen in the same action (a step which would have shaped a lawsuit identical to that which the

company would have had to defend if Parker had intervened).

As we show below, the rationale of *American Pipe* is fully applicable to the filing of a separate action by a class member. Moreover, application of equitable tolling principles to allow the institution of separate suits, as well as intervention, by putative class members following the denial of certification in cases brought as class actions is fully consonant with the important purposes underlying statutes of limitations.

A. The Decision Below Correctly Construes And Applies This Court's Ruling In *American Pipe*

1. *The basis for* American Pipe

In *American Pipe*, 414 U.S. at 554, this Court said:

> [T]he rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. [footnote omitted]

As the court below ruled, the rationale underlying *American Pipe* applies with full force to the bringing of an individual action by a member of the putative class who could properly believe that he was covered by the action in which class certification was ultimately denied.

The purpose of tolling the statute of limitations in *American Pipe* was to discourage premature interventions by putative class members which would remove the advantages of judicial economy and efficiency that are available in class litigation under F.R. Civ. P. 23. If the statute of limitations were not tolled while the motion for class certification were pending, members of the class would be obliged, in order to protect their individual rights, either to file separate lawsuits or to seek to intervene in the putative class action, thus unnecessarily bur-

dening the courts. Thus, tolling the limitations period during the pendency of the class action is designed to encourage class members to delay pursuing their claims for redress until the motion for certification has been acted upon.

2. *Scope of the* American Pipe *rule*

With this purpose in mind, it makes little sense to view the availability of tolling as limited to post-certification-denial intervention only. Wholly apart from considerations of tolling, a member of a putative plaintiff class, whose individual claim has accrued, has at least two options to obtain judicial relief: intervention and the filing of a separate suit. Any number of factors may make intervention the less desirable course. For example, the number of parties already in the suit may be so large that further joinder would make it unmanageable.[6] Discovery schedules may already have been established which would be difficult for the proposed intervenor to meet. The putative class action may be regional or nationwide in scope and have been filed in a jurisdiction far from the residence or workplace of the proposed intervenor.[7] Finally, intervention may be available only at the discretion of the trial court and may be denied on grounds unrelated to the merits of the proposed intervenor's claim.[8]

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[6] Especially in the case of a large company against which a Title VII putative class action has been brought, the number of individual employees or applicants who could seek intervention or file separate suits is likely to be substantial.

[7] For example, a Title VII suit might challenge the hiring or promotion practices of a large corporation with plants or facilities throughout the nation. In other types of class suits, the possibility of concentrating many separable suits in one jurisdiction could be even greater.

[8] *See* F.R. Civ. P. 24(b).

For all of these reasons, the filing of separate litigation by a class member is at least as likely, and often more likely, than attempted intervention. Yet, if the tolling rule of *American Pipe* is to be limited to intervention, as Crown contends, it will have little efficacy. Counsel for putative class members will be on notice (as they are not presently on notice from the *American Pipe* opinion) that if they take advantage of the tolling rule during the pendency of the class action, they may be unable fully to protect their clients' rights, should certification be denied, because they will be limited to seeking intervention in the former class lawsuit, no matter what its procedural posture, no matter how inconvenient the forum in which it is pending, etc. Obviously, there will be no incentive to employ the *American Pipe* option and the federal courts will be burdened with a multiplicity of suits.

This result is especially likely because there may be no way for counsel representing an individual member of a putative class to predict, at the time his client's claim accrues, what the relative advantages and disadvantages of intervention may be, many months later (after disposition of the certification question). At that point in time, however, the remaining individual claims in the suit may be sufficiently different from those of the proposed intervenor that, had he been a party to the suit from its inception a court might properly have ordered a severance of his claim. In such a case, of course, there is no reason why disparate claims should be tied together by an "intervention only" reading of *American Pipe*.

3. *Application of* American Pipe to this case

The facts of this case demonstrate why the *American Pipe* decision should be construed to toll the statute of limitations and permit a putative class member to bring an individual suit once class certification has been denied. At the time Parker's cause of action accrued, *i.e.*, when he

received the notice of right to sue, the *Pendleton* class action had already been started. Parker could reasonably believe that his rights would be fully protected by that action, since the allegations in *Pendleton* specifically covered his complaint of harassment and discharge because of his race. (Pet. Br. App. 2a-4a.) An individual action by Parker at that time would have involved a tremendous duplication of effort. Evidence of bias against the class as a whole would have been relevant to his individual claim, and thus broad discovery would have been involved in both cases. *See Teamsters v. United States*, 431 U.S. 324, 361-62 (1977).

There was also no need for Parker to intervene in the class action because of any dissatisfaction with the representation of the putative class by the named plaintiffs. In this case, as it happens, Parker and the named plaintiffs had the same attorney, so that intervention prior to denial of class certification would not have added new counsel to the case. Normally, however, intervention by all the various members of a class who have individual claims would involve unnecessary participation by a number of lawyers with all the possibilities of time-consuming differences that often attend multiple representation in the same case. It was therefore proper and efficient, and in accordance with the purposes of Rule 23, for Parker to rely on the class action while it was pending.

After class certification was denied, Parker filed this lawsuit, rather than following the exact procedural route (intervention) used in *American Pipe*. However, this difference is of no significance since Parker then moved to consolidate this suit with what remained of the putative class action brought by Pendleton and Allen. Thus, the considerations of judicial efficiency and fairness—litigation of all of the discrimination claims against Crown at the same time and in the same court—which led this Court to announce the tolling rule in *American Pipe*, would be realized by permitting Parker's action to

continue. On its facts, therefore, there is no viable distinction between this case and *American Pipe* which could justify the district court's refusal to apply the tolling principle of that decision.

Moreover, Crown's opposition to consolidation of the *Parker* and *Pendleton* cases indicates the defect inherent in a reading of *American Pipe* which limits the tolling doctrine to intervention. Intervention by a member of the putative class into a suit still pending as classwide litigation may qualify as intervention "of right" under F.R. Civ. P. 24(a)(2). *See* Advisory Committee Notes, 39 F.R.D. 69, 110 (1966) [Rule 24(a)(2) incorporates standards of Rule 19(a)(2)(i)]. However, once class certification has been denied, the only possible basis for intervention by a member of the class that had been proposed for certification would be F.R. Civ. P. 24(b). Such intervention is permissive and may be denied in the discretion of the court.

As Crown's opposition to the motion to consolidate the *Parker* and *Pendleton* cases indicates, the basis for denying intervention may have nothing to do with the claims of the individual seeking to enter the case. Crown's first ground for objecting to consolidation was that, because of its earlier filing and active discovery the *Pendleton* suit was in a different procedural posture from Parker's. Memorandum by Defendant Crown, Cork And Seal Company, Inc., in Opposition to Plaintiff's Motion to Consolidate, *Parker v. Crown, Cork & Seal Company*, Civ. No. M-80-2839 (D. Md. filed Jan. 9, 1981), at 1-3 [hereinafter cited as "Crown Consolidation Memo"]. Of course, this will always be the case where an individual claimant intervenes following *American Pipe* tolling. Since delay in adjudication is explicitly identified as a ground for denying permissive intervention, F.R. Civ. P. 24(b), to require a member of the putative class to proceed only by way of intervention following denial of class certification could result in extinguishing the very claim whose preser-

vation it is the object of the *American Pipe* tolling rule to secure.

Crown's second ground for opposing consolidation was that there were not "common issues of fact" in the two cases because "Parker's termination involved entirely different facts, circumstances and witnesses, different supervisory employees, different work rules, a different department and a different employment history than those involved in the terminations of Pendleton and Allen." Crown Consolidation Memo, at 3. Again, this sort of argument will be available, almost by definition, to an employer resisting a motion for intervention by a putative class member following *American Pipe* tolling. Since the existence of a common question of law or fact is a prerequisite for intervention, *see* F.R. Civ. P. 24(b)(2), the difficulty created by limiting *American Pipe* to post-certification-denial intervention is at once apparent.

4. *The language and cases on which Crown relies*

Crown relies on this language in the *American Pipe* opinion:

> [A]t least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," the commencement of the original class suit tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

414 U.S. at 552-53. The holding in that case was, of course, no broader than required to decide the matter before the Court. In *American Pipe*, class certification had been denied by the district court on the sole ground that the class was not so numerous as to make joinder impracticable—the court finding that all other prerequisites for class action status had been satisfied. Local jurisdictions originally covered by the class definition in

Utah's complaint then sought to intervene as parties plaintiff in Utah's action, but intervention was denied on the ground that the statute of limitations had run. Under these circumstances, this Court's holding was that intervention should have been granted in the case before it because the running of the statute was tolled during the period prior to denial of class certification.

Crown apparently would read the Court's language as defining the outer limits of the equitable tolling principle which it was applying, although it can point to nothing in the opinion itself which so states. As we have earlier explained, the *reasoning* which led the Court to apply tolling pending the determination of a motion for class certification applies not only to intervention, but also—and with equal force—to the commencement of a separate action. The Court itself intimated this in the *dictum* in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974):

> Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah* [citation omitted], which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

(Since class members would not opt out of a class action only to seek to intervene into it again, this statement must mean that a putative class member can opt out and bring his own suit within the time remaining under the applicable statute of limitations.) *See also United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 402 (1977) (Powell, J., dissenting).

The lower court opinions on which Crown also relies likewise fail to analyze *American Pipe's* rationale and instead reflexively apply the language describing the Court's holding. In *Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2d

Cir. 1977), plaintiffs sought the benefit of the tolling principle during the entire pendency of a class action even though the putative class did not include them for nearly two years after the suit was filed, when an attempt was made to expand the class by filing an amended complaint. Unless the amended complaint "related back" to the initiation of the case for tolling purposes, the claims in question were barred by a three-year statute of limitations. *See* 550 F.2d at 779. The Second Circuit refused to extend the tolling principle in this fashion, noting that it "would not accord with one of the rationales of *American Pipe*, that commencement of the class action adequately notifies the defendants" of the number and generic identities of the potential plaintiffs. *Id.* at 782. The Second Circuit went on, in *dictum*, to use the language on which Crown relies (*see* Pet. Br. 8):

> Of especial significance is the fact that the rule of *American Pipe* was intended for the benefit of purported members of the class who sought to *intervene* in the action after class status was denied.

However, in the same paragraph, the panel made it clear that this was not the basis for its judgment:

> To suspend the statute in this case, however, would result in the maintenance of another suit by plaintiffs who took no action [*i.e.*, neither intervention nor commencement of litigation] for almost five years after they were aware of information sufficient to put them on notice of possible fraud by the defendant.

Id. at 783 (footnote omitted).

In *Stull v. Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), also cited by Crown, the panel rejected an *American Pipe* tolling claim in one short paragraph which merely quoted the dictum of *Arneil v. Ramsey* and described the claim as "completely without merit." There was no analysis of the purposes of the equitable tolling doctrine or consideration of circumstances which might have led a court of equity to decline to apply the doctrine. (For example, the putative class

action which was the claimed basis for tolling the statute of limitations in *Stull* was an action filed by the appellant on behalf of his wife against the same defendant "on a complaint almost identical to" that before the court. 561 F.2d at 433.)

Finally, in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3320 (No. 82-650, Oct. 12, 1982), a divided panel declined to apply *American Pipe* tolling to allow a separate suit after denial of class certification because, it said, policies of judicial efficiency and economy would not be furthered. The majority rejected the appellant's argument that proceeding by way of intervention would be cumbersome since there was "an unchallenged factual finding that the class was not numerous. . . . The *American Pipe* rule, therefore, does not support appellant's argument that she should be authorized to commence an independent suit without regard to limitations where class action status has been denied and no intervention is sought." 681 F.2d at 620. The panel majority neither considered other potential problems for a would-be intervenor (*see* pp. 9-10 *supra*) nor evaluated the tolling claim with the same depth as the court below, *see* 677 F.2d at 393-94.

On the other hand, a number of Courts of Appeals—while not directly deciding the question whether the *American Pipe* tolling doctrine should be limited to intervention—have, in construing that decision in other contexts, enunciated the tolling principle in terms which would obviously cover the institution of separate actions. *E.g.*, *In re Fine Paper Litigation*, 632 F.2d 1081, 1085, 1087 (3d Cir. 1980); *Susman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980); *Jiminez v. Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 427 U.S. 912 (1976); *Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1096-98 (3d Cir. 1975); *cf. Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978) (pretermitting question), *vacated on other grounds*, 445 U.S. 940

(1980). Many commentators have also rejected a narrow interpretation of *American Pipe* in light of its underlying rationale. *E.g., Developments in the Law: Class Actions*, 89 Harv. L. Rev. 1318, 1448 (1976); Note, *Class Actions & Statutes of Limitations*, 48 U. Chi. L. Rev. 106 (1981); Note, *Class Actions—Tolling of Statutes of Limitation—Adequate Representation—Haas v. Pittsburgh National Bank*, 17 B.C. Indus. & Com. L. Rev. 915, 919 (1976).

In sum, if *American Pipe* is read narrowly, either to limit its holding to situations where class certification is denied only on the ground of lack of numerosity or where intervention after denial of certification is sought, many potential class members will undoubtedly feel obliged to commence their own suits while class certification is pending if there is a danger that otherwise they will be barred by a statute of limitations. This would be contrary to the underlying rationale of the *American Pipe* decision, to promote judicial efficiency and economy. To say that Parker could have intervened in the *Pendleton* suit after denial of class certification but could not, within the same time limits, bring his own action, is truly, as the court below stated, to exalt form above substance.[9]

B. Tolling The Statute Of Limitations In This Case Is Consistent With The Purposes Of Limitations Periods

Crown argues that the application of *American Pipe* tolling principles to sustain the filing of separate Title VII actions following denial of class certification will "[u]ndermine the [p]urpose and [e]ffect of [s]tatues of [l]imitation" (Pet. Br. at 21). This contention is completely without merit, especially in light of the company's concession that Parker could probably have *intervened* in the *Pendleton* case after denial of class certification. Un-

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[9] Parker's motion for intervention after class certification was denied has no relevancy to the issue in this case. It was solely for the purpose of taking an appeal from the denial of class certification, an issue not here presented. *See* note 3 *supra*.

less action other than intervention would present issues that were not raised by the original class filing, or otherwise seriously inconvenience or prejudice the defendant, there is no reason why the statute of limitations should not toll for putative class members using a procedure other than intervention.[10]

Statutory limitations periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared." *American Pipe*, 414 U.S. at 554, quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). As *American Pipe* holds, in the context of class actions the policy of ensuring essential fairness to defendants is satisfied where a class suit "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." Thus, within the limitations period, "defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation . . . ." 414 U.S. at 555. *See United Air Lines, Inc. v. McDonald*, 432 U.S. at 392-93, where this Court stated that "the lawsuit had been commenced by the timely filing of a complaint for class-wide relief, providing United with the essential information necessary to determine both the subject matter and size of the prospective litigation."

Certainly in the instant case Crown had ample notice of Parker's individual claims. The allegations of racially motivated harassment and termination were included in the class complaint. Parker was also identified as one of the putative class members (*cf.* Pet. Br. App. 19a). In addition, Parker had filed a timely charge with the

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[10] *See* Note, *Class Actions—Tolling of Statutes of Limitations—Adequate Representation—Haas v. Pittsburgh Nat'l Bank*, 17 B.C. Indus. & Com. L. Rev. 915, 922 (1976).

EEOC, thereby giving Crown notice of his claims. Crown concedes that it had sufficient notice to defend against Parker's allegations if Parker had intervened in the *Pendleton* case rather than brought his individual cause of action. Since the instant action will involve the same evidence, witnesses and memories that would have been involved if Parker had intervened, it is difficult, if not impossible, to understand why notice would be sufficient for him to intervene, but not sufficient to bring an individual action.

While in *American Pipe*, the lower court had determined that the named plaintiffs' claims were typical of those of the putative class members, this Court did not require typicality as a prerequisite to tolling; nor have most lower courts. What is required is that the defendant receive the essential information necessary to determine both the subject matter and size of the prospective litigation. *McCarthy v. Kleindienst*, 562 F.2d 1269, 1274 (D.C. Cir. 1977). Although a typicality finding is one factor indicating that the defendant has received adequate notice of the potential claims against him, the court can also determine whether the defendant has received fair notice by comparing the allegations of the class complaint with those of the motion to intervene (*id.*), or the complaint in an individual action.[11]

Because Crown cannot seriously argue that it was unaware of Parker's individual claims during the time that *Pendleton* was proceeding as a putative class action on behalf of black employees allegedly subjected to racially

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[11] One commentator has suggested that in many of these cases the question of notice to the defendant may not have been presented by the defendant or it may have been obviated because it was clear to all that the defendant must have received notice. Indeed in most cases it will be obvious that the defendant received notice from the filing of the class suit that class members would have claims. Note, *Class Actions & Statutes of Limitations*, 48 U. Chi. L. Rev. 106, 110 n.22 (1981).

based harassment and termination, application of equitable tolling principles in this case results in no unfairness to the employer nor inconsistency with the purposes of the 90-day suit requirement of Title VII.[12]

Finally, there is also no merit in petitioner's argument that the ninety-day period for bringing suit under Title VII should be construed as a jurisdictional prerequisite rather than as a statute of limitations (Pet. Br. 24-29). It is no more jurisdictional than the statute involved in *American Pipe*. Indeed, it is no more, but rather less, jurisdictional than the time for filing administrative charges which this Court in *Zipes v. Trans World Airlines, Inc.*, —— U.S. ——, 102 S. Ct. 1127 (1982), held not to be jurisdictional. The charge marks the first official notice to the employer of the claims against him, whereas the filing of suit notifies the employer that the plaintiff intends to pursue the charge in court. The jurisdiction of the court is conferred by Section 706(f)(3), giving district courts power to determine the cause of action; the ninety-day period is purely one of limitation on the time for bringing suit. The statute is thus subject to the tolling principles announced in *American Pipe*.

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[12] Crown's suggestion that the federal courts cannot apply equitable tolling principles in Title VII cases because "the language of Section 2000e-5 does not provide any exception to, or provision for, the tolling of that ninety-day period" (Pet. Br. at 21) finds no support in *American Pipe*, where this Court's determination to apply tolling principles did not rest upon any reference to the quite different tolling provision in the Clayton Act. *Compare* 414 U.S. at 541-42 & nn.2, 3 *with id.* at 545-56. The argument is very similar to one made in *American Pipe*, to the effect that the courts were without power to apply equitable tolling because the statute of limitations was a "substantive" right under the statute. The Court rejected that contention, emphasizing that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 558 (footnote omitted). *See* text *infra*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-118

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42.3 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the petitioner, Crown, Cork & Seal Company, Inc., in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their contituents, are employers subject to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether the pendency of a proposed class action tolls the running of a limitations period for purposes of allowing potential class members to file separate actions after certification of a class is denied.

3. EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g, Ford Motor Company v. EEOC*, 102 S. Ct. 3057 (1982); *General Telephone Co. of the Southwest v. Falcon*, 102 S. Ct. 2364 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *East Texas Motor Freight System, Inc. v. Rodriguez*,

431 U.S. 395 (1977); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

4. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Shell Oil Company* v. *Anne M. Dartt*, 434 U.S. 99 (1977); *Zipes v. Trans World Airlines, Inc.*, 102 S. Ct. 1127 (1982).

5. The written consent of counsel for the petitioner, Crown, Cork & Seal Company, Inc., has been filed with the Clerk of the Court. Efforts to obtain the consent of the counsel for the respondent, Theodore Parker, were unsuccessful.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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December 23, 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-118

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,

v.

THEODORE PARKER,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae in support of the petitioner contingent upon the Court's granting the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of EEAC in this case is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

Theodore Parker, a black male, was discharged from Crown, Cork & Seal Company, Inc. ("Crown") on July 15, 1977. On October 3, 1977, he filed a

charge of discrimination with EEOC alleging racially discriminatory harassment and discharge. The charge was deferred to the Maryland Commission on Human Relations ("MCHR"). On September 15, 1978, a separate class action was filed against Crown by two other persons in *Pendleton v. Crown, Cork & Seal Company, Inc.*, Civil No. M-78-1734 (D. Md.) (hereinafter "*Pendleton*"), alleging racially discriminatory harassment and discharges, among other claims. On November 9, 1978, EEOC adopted the findings of the MCHR, found no reasonable cause on Parker's charge and issued a "Notice of Right to Sue" within ninety days. Parker received the "Notice of Right to Sue" and did not file suit within the specified ninety-day period.

On May 31, 1979, the named plaintiffs in the *Pendleton* case moved to certify a class pursuant to Rule 23(b)(2)[1] of the Federal Rules of Civil Procedure. Plaintiff Pendleton sought to represent a class of black employees who could have filed a charge of racially discriminatory termination on or after January 12, 1973. Plaintiff Allen sought to represent a class of black employees who could have filed charges of racially discriminatory termination, job assignment, retaliation and harassment. On July 13, 1979, the district court held a hearing and ruled on certain of the

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[1] Rule 23(b)(2) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

class certification issues, while reserving certain other issues. Plaintiffs Pendleton and Allen moved to reconsider certain of these rulings. On July 25, 1980, EEOC sent a second "Notice of Right to Sue" to Parker.

By order dated September 4, 1980, the court in the *Pendleton* case "decided to reiterate its previous rulings as well as now rule on the questions reserved." Memorandum and Order, Civil No. 78-1734 (D. Md. September 4, 1980). In its memorandum and order, the court stated that:

> Plaintiff Pendleton's motion to represent *all* black employees terminated on or after January 12, 1973, was denied at the hearing of July 13, 1979, for two reasons: his claims were not typical of those of the putative class and he was an inadequate class representative.

Id., at 2. Among the reasons for the denial was the fact that Pendleton, as a probationary employee, would not have claims which were typical of Crown's permanent employees, nor would he adequately represent the permanent employees. On the question of whether Pendleton could represent a class of black probationary employees, which question was reserved at the close of the July 13, 1979, hearing, the court denied certification because the plaintiffs failed to satisfy their burden as to numerosity and adequacy of representation.

With regard to Allen's motion for class certification, the court stated:

> At the close of the hearing on July 13, 1979, the court denied Allen's motion to represent a class of black employees on the issues of termination, job assignment, and retaliation. The question whether Allen could represent a class on the issue

> of harassment was reserved. Plaintiffs have filed a motion for reconsideration on the issue of termination and defendant has filed a response.

Id., at 6. Further, the court stated that at the close of the hearing on July 13, 1979, it had denied Allen's motion for class certification on the issue of termination "finding that Allen's claim was at best part of his reprisal claim because he did not file an administrative charge of discriminatory termination subsequent to his firing on September 4, 1974." *Id.*, at 8. The court concluded that Allen could not represent a class of black employees on the issue of termination because "[p]laintiffs have not only failed to satisfy the Rule 23 requirements of numerosity and typicality on this issue, but have also not demonstrated that the termination issue is properly before the court." *Id.*, at 10. Finally, with regard to the question of whether Allen could represent a class of black employees on the claims of harassment, which question was reserved at the end of the July 13, 1979, hearing, the court concluded that the plaintiffs had failed to carry their burden under Rule 23(a) [2] of the Federal Rules.

On October 27, 1980, Parker filed the instant action. Thereafter, Crown moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that Parker's suit was filed

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[2] Rule 23(a) reads as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

nearly two years after he received his ninety-day "Notice of Right to Sue." Before that motion was decided, on February 26, 1981, a stipulated order of dismissal with prejudice was entered by the district court in the *Pendleton* case as a result of a settlement of the individual claims of Pendleton and Allen. On March 30, 1981, Parker moved to intervene in the *Pendleton* case, pursuant to Rule 24(b) [3] of the Federal Rules of Civil Procedure, in order to appeal the denial of class certification. The district court granted Parker's motion to intervene on April 16, 1981. On May 14, 1981, Parker noticed an appeal to the Fourth Circuit Court of Appeals. Subsequently, however, Parker consented to Crown's motion to dismiss the appeal as untimely filed.

In Parker's individual suit, the district court dismissed the action as untimely, ruling that the ninety-day period for filing a Title VII suit had not been met. In an opinion reported at 514 F. Supp. 122 (D. Md. 1981), the district court (Miller, J.) held "that the *American Pipe* tolling rule is applicable only to Title VII class members who seek intervention in the original suit," 514 F. Supp. at 126, and is not tolled with respect to separate, individual actions. The Fourth Circuit Court of Appeals reversed the district court in an opinion reported at 677 F.2d 391 (4th Cir. 1982), holding that "the pendency of a putative class

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[3] Rule 24(b) reads in pertinent part as follows:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

action tolls the running of limitations for members of the putative class both for purposes of intervention and the filing of a new suit based upon a cause of action embraced within the putative class action until certification of the class is denied." 677 F.2d at 394.

SUMMARY OF ARGUMENT

The rule adopted by the Fourth Circuit allowing tolling for putative class members who file separate actions after class certification is denied is an unwarranted and unnecessary extension of the tolling rule established in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) (*"American Pipe"*). Since there are a number of alternative means by which Title VII claimants can exercise their rights, including intervention following the denial of class certification, there is no compelling rationale for extending the *American Pipe* rule. In addtion, the tolling rule established by the Fourth Circuit is likely to result in a decrease in the litigative efficiency and economy which the *American Pipe* rule was designed to foster.

In *American Pipe*, this Court held that "the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene after the court has found the suit inappropriate for class action status.*" *Id.*, at 553 (emphasis added). The *American Pipe* rule was designed to promote "the efficiency and economy of litigation which is a principal purpose of [Rule 23]," *id.*, at 553, by precluding the need for putative class members to file protective motions to intervene during the pendency of class certification. As such, the *American Pipe* decision provides a limited equitable tolling for those who seek to intervene fol-

lowing denial of class certification. Nowhere in the *American Pipe* decision does the Court discuss or contemplate a tolling for purposes of filing a *separate action*. Neither does this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), offer support for the Fourth Circuit rule, since that case involved a class which was *certified* pursuant to Rule 23(b)(3) and since the tolling issue was not before the Court in that case.

The rule adopted by the Second and Ninth Circuits, which limits tolling to putative class members who timely seek to intervene after class certification is denied, is consistent with the rationale of *American Pipe* and is supported by strong policy considerations. *See, Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982); *Stull v. Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977). In *Pavlak*, the Ninth Circuit stated that neither the *American Pipe* principles of fairness to plaintiffs who refrained from filing based on the pending class suit nor the judicial efficiency derived from eliminating the need to file protective motions "avails a plaintiff who fails to intervene but instead files an individual suit after class certification has been denied." 681 F.2d at 620.

The Second and Ninth Circuit rule, in conjunction with alternative means of asserting a Title VII claim, provide a wholly adequate mechanism by which Title VII claimants can assert their rights. In the instant case, the plaintiff could have filed a timely separate action or moved to intervene in the pending class action following receipt of his "Notice of Right to Sue" from EEOC. He also could have moved to intervene in the *Pendleton* case following the denial of class

certification in that case. Finally, following the dismissal of the *Pendleton* case, he could have moved to intervene and filed a timely appeal of the denial of class certification. These various alternative procedures provide a wholly adequate means for the assertion of Title VII rights, without extending the *American Pipe* rule to separate actions.

The rule adopted by the Fourth Circuit presents serious problems of judicial administration and is likely to undermine the economy and efficiency of litigation which the *American Pipe* rule was designed to foster. The Fourth Circuit rule is likely to encourage a form of "one-way intervention" and forum shopping which Rule 23 was designed to prevent by allowing putative class members to seek to intervene if the litigation appears likely to produce a favorable result, or to file a separate action if they deem that more advantageous. In addition, the Fourth Circuit rule is likely to encourage "overlapping class actions" where a putative class member files a separate class action after denial of class certification in the original action. Such overlapping classes could lead to an indefinite tolling of the limitations period and is inconsistent with the strict time periods for filing set forth in Title VII as well as the underlying purposes of Rule 23. The Second and Ninth Circuit rule, in addition to providing an adequate means for the assertion of Title VII claims, also serves the interests of judicial efficiency and economy by allowing the judge who is familiar with the facts of the case to handle the claims of putative class members as well.

ARGUMENT

THE RULE ADOPTED BY THE FOURTH CIRCUIT, WHICH ALLOWS A TOLLING FOR PUTATIVE MEMBERS OF A CLASS WHO FILE SEPARATE ACTIONS AFTER THE CLASS IS DENIED CERTIFICATION, IS AN UNWARRANTED EXTENSION OF THE RULE IN *AMERICAN PIPE*

This Court, in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), held that the commencement of a class action tolls the statute of limitations for putative members of the class who timely seek to intervene after the court has denied class certification. Nothing in the *American Pipe* decision, nor in later cases decided by this Court, warrants the extension by the Fourth Circuit of the *American Pipe* tolling rule to putative members of the class who file a *separate action* after class certification is denied. Given the numerous other means, including timely intervention in the original action, by which aggrieved plaintiffs in these circumstances can exercise their rights under Title VII, there is no reason to extend the *American Pipe* rule to include persons filing separate actions. Such an extension is likely to produce substantial problems of judicial administration and may undermine seriously the important goals of litigative efficiency and economy which the *American Pipe* rule was designed to further.

A. The Tolling Available to Putative Class Members Should be Limited to Persons Who Timely Seek to Intervene in the Original Action After Class Certification Is Denied

American Pipe involved a private antitrust action that was filed eleven days prior to the expiration of the statute of limitations period. The trial court later denied certification of a class of plaintiffs because the

class did not satisfy the requirements of numerosity set forth in Rule 23(a)(1). No one appealed the denial of class certification. Eight days after denial of class certification, a number of putative class members moved to interevene as plaintiffs in the original action. The trial court denied intervention, concluding that the statute of limitations had not been tolled as to the putative class members by the institution of the class action and that they were precluded from suit by the running of the limitations period.

This Court held that the commencement of the original class suit tolled the running of the statute of limitations for putative class members of the class who timely sought to intervene after class certification was denied. In so doing, the Court stated:

> We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene after the court has found the suit inappropriate for class action status.*

Id., at 552-53 (emphasis added). In adopting this rule, the Court reasoned that under a contrary rule "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable," *id.*, at 553, thus "depriv[ing] Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.*

The rule adopted in *American Pipe* was deemed by the Court to be consistent with the purpose of a

statute of limitations of preventing surprises "through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.*, at 554, citing *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). However, the rule set forth in *American Pipe* contemplated only situations in which "the actual trial is conducted in the form of a class action, as a joint suit, *or as a principal suit with additional intervenors.*" *Id.*, at 555 (emphasis added).

Justice Blackmun, in his concurring opinion in *American Pipe*, offered a cautionary note regarding the limited scope of the tolling rule established:

> Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.

Id., at 561. In addition, Justice Blackmun stated that:

> Permissive intervenors may be barred . . . if the district judge, in his discretion, concludes that the intervention will 'unduly delay or prejudice the adjudication of the rights of the original parties.' Fed. Rule Civ. Proc. 24(b). The proper exercise of this discretion will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

Id., at 562. Nowhere in the *American Pipe* decision does the Court discuss or contemplate the filing of

separate actions. Not only did the Court limit its discussion to instances where putative class members timely sought to intervene, it also instructed the lower courts to exercise their discretion under Rule 24(b) to insure that defendants were not prejudiced by the tolling rule. Thus, the Fourth Circuit rule, which allows tolling of limitations periods where a separate action is filed, represents an extension beyond those circumstances envisioned by the Court in *American Pipe*.

In adopting the rule that allows a tolling for putative class members who file separate actions, the Fourth Circuit acknowledged that this Court has not "applied the holding in *American Pipe* in any other context [other than intervention]." 677 F.2d at 393. Lacking direct Supreme Court support for its holding, the Fourth Circuit looked to dictum in a footnote in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), a case dealing with another issue and holding only that where a Rule 23(b)(3) class is certified, Rule 23(c)(2) requires that notice *must* be sent to all class members whose names and addresses may be determined through a reasonable effort. In response to an argument that individual notice was not necessary because class members would not opt out of the class since the statute of limitations period had run, the Court in *Eisen* stated that:

> This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Id., at 176 n. 13. This footnote, however, should not be read as determining the issue in this case, because

the tolling issue was not before the Court in *Eisen*. *American Pipe*, to which *Eisen* referred, concerned the question of intervention, not individual suits.

The Ninth Circuit in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), rejected the argument that the *American Pipe* tolling rule was extended by the footnote in *Eisen*, discussed above. In so doing, the court stated:

> We do not read it, however, as effecting a drastic expansion of *American Pipe* beyond the solid equities of its factual underpinnings. The footnote seems to allow a class member who opts out at the time of receiving notice of the institution of a class action to commence his own separate suit. It does not, however, authorize tolling of the statute of limitations for those who file separate actions at the time of denial of class certification. That issue was not presented in *Eisen*.

Id., at 620-21. *Accord, Wachovia Bank & Trust Co. v. Nat. Student Marketing*, 461 F. Supp. 999, 1012 (D.D.C. 1978), *aff'd on this ground, rev'd on other grounds*, 650 F.2d 342, 346 n. 7 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

The dictum from *Eisen* therefore is not instructive of the instant issue. In *Eisen* the Court was concerned with a class which had been certified pursuant to Rule 23(b)(3) and *not* one where certification was denied, as in *American Pipe* and the instant 23(b)(2) case. The Court in *American Pipe* determined that "a timely class action complaint commences the action for all members of the class *as subsequently determined*." 414 U.S. at 550 (emphasis added). The language in the *Eisen* footnote merely confirms that the statute of limitations is tolled for all class members *as subse-*

quently certified. Accordingly, the *Eisen* footnote addresses a situation which is markedly different from that presented herein and offers no guidance as to whether the *American Pipe* rule should be extended to the instant situation.

Numerous courts and commentators who have addressed the issues presented herein have concluded that the *American Pipe* rule is available only to putative class members who timely seek to intervene in the original action after class certification is denied.[4]

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[4] For other decisions holding or suggesting that putative class members may receive the benefits of tolling only if they *intervene* after class certification is denied, *see Wachovia Bank & Trust Co. v. Nat. Student Marketing Corp.*, 461 F. Supp. 999, 1012 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342, 346 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Jefferson v. H.K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D. Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir. 1981); *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 614-15 (S.D.N.Y. 1980). Various commentators have also persuasively maintained that the tolling rule of *American Pipe* is limited to putative class members who seek to intervene. *See e.g.*, 3B *Moore's Federal Practice* ¶ 23.90[3], at 23-556 n. 16 (1981) ("Although the statute of limitations is tolled by the filing of a class action for purposes of permitting a member of the purported class to intervene after the class has been disallowed, it is doubtful that a class member will be permitted to bring an individual action after the statute of limitations had run."); Note, *Federal Courts—Rules of Civil Procedure—Postjudgment Motion to Intervene to Appeal Denial of Class Certification is Timely*—United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), 1978 B.Y.U. L. REV. 189, 194 ("Where the statute of limitations has run after the filing of the class action complaint but before denial of class certification, all excluded parties will be barred from filing their own actions, and it appears that they can seek relief only by moving to intervene in the individual action that was brought before the statute of limitations ran."); Wheeler, *Predismissal Notice*

In *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), an action alleging violations of federal securities laws, the Second Circuit limited the *American Pipe* ruling to those putative class members who sought to intervene in the original action. In so doing, the court stated:

> Of especial significance is the fact that the rule of *American Pipe* was intended for the benefit of purported members of the class who sought to *intervene* in the action after class status was denied . . . To suspend the statute in this case, however, would result in the maintenance of another suit by plaintiffs who took no action for almost five years after they were aware of information sufficient to put them on notice of possible fraud by the defendant.

Id., at 783 (footnote omitted). Similarly, in *Stull v. Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), the Second Circuit again refused to extend the benefit of tolling to putative class members who filed a separate action rather than intervening. The court stated:

> Appellant's argument that this reprieve should be extended to class members who file separate suits after the class action has been terminated and the statute of limitations has expired is completely without merit. '[T]he rule of *American Pipe* was intended for the benefit of purported members of

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and Statutes of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah, 48 S. CAL. L. REV. 771, 783 (1975) ("By allowing plaintiffs to sue after an adverse 23(c)(1) determination only by intervening, rather than by commencing new actions elsewhere, the Court ensures that all plaintiffs will appear together in a single court to litigate matters familiar to that court").

> the class who sought to *intervene* in the action after class status was denied.' *Arneil v. Ramsey, supra*, 550 F.2d at 783.

Id., at 433.

The Ninth Circuit has taken a similar approach in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), in holding that a statute of limitations was not tolled where a putative class member filed a separate action after class certification pursuant to Rule 23(b)(3) was denied. The court in *Pavlak* concluded that:

> *American Pipe* permitted a toll of the statute of limitations for a class member who intervened in the action in which class certification was denied and we conclude that its rationale cannot be extended to those who do not intervene, or try to do so.

Id., at 618. In so holding, the Pavlak court discussed the reasons for tolling a limitations period:

> There are two principle reasons for tolling a limitations statute pending class certification. The first is fairness to any plaintiffs who may have refrained from filing suit or moving to intervene, expecting the case to proceed as a class suit. The second, closely related, justification for the tolling rule is that it serves judicial efficiency by eliminating the need to file intervention motions as a protective measure before the certification ruling is issued. Tolling the statute protects those interests by permitting plaintiffs to defer intervention motions until the class certification issue is decided. These are the principles underlying *American Pipe*. Neither of these reasons, however, avails a plaintiff who fails to intervene but files an individual suit after class certification has been denied.

Id., at 620. The reasons for tolling advanced by the Ninth Circuit are persuasive and, as will be discussed in parts B and C herein, neither of these reasons is furthered by tolling in order to allow the filing of a separate action.[5]

As the above discussion demonstrates, neither the *American Pipe* decision nor subsequent decisions provide a persuasive rationale for extending tolling to putative class members who file a separate action. As will be set forth below, substantial policy and administrative reasons exist why such an extension of the *American Pipe* rule should not be sanctioned by this Court.

B. A Rule Limiting Tolling to Persons Who Intervene in the Original Action, in Conjunction with Other Available Avenues of Relief, Provides a Comprehensive Scheme Under Which Putative Class Members Can Exercise Their Rights Under Title VII

Pursuant to Title VII and case law as determined by this Court, there exists a comprehensive and multifaceted scheme under which a Title VII plaintiff such

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[5] For decisions which have held or implied a tolling for putative class members filing separate actions, *see e.g., In Re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3d Cir. 1980); *Susman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980); *Satterwhite v. City of Greenville*, 578 F.2d 987, 996-97 (5th Cir. 1978), *vacated for reconsideration*, 445 U.S. 940 (1980); *Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979); *Green v. United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979); *Nelson v. United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n. 19 (D. Hawaii 1976). For the reasons stated herein, those decisions provide no persuasive reason for extending the *American Pipe* tolling rule to persons who file separate actions.

as Parker can exercise his rights. In the instant case, there were at least five alternatives means available to Parker at various stages of the *Pendleton* litigation and thereafter for asserting his claim against Crown. Such a comprehensive scheme provides a wholly adequate mechanism for a Title VII plaintiff to have his grievance litigated, without the need for an extension of the *American Pipe* tolling rule to include separate actions filed after class certification is denied.

First, Parker could have had his claim heard by filing an individual action within ninety days of receipt of the "Notice of Right to Sue" issued by EEOC on November 9, 1978. Such an action could have been filed separately from the then-pending *Pendleton* case. Secondly, Parker could have moved to intervene in a timely manner as a named plaintiff in the *Pendleton* case after receipt of his "Notice of Right to Sue." By so intervening, he could have asserted his claim separately or as part of the class allegations then pending. A third possible point at which Parker could have taken action on his claim was following the denial on July 13, 1979, in the *Pendleton* case, of certain of the class allegations raised therein.[6]

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[6] The district court, on July 13, 1979, in *Pendleton*, apparently denied Pendleton's motion to represent *all* black employees terminated on or after January 12, 1973. This denial of a class of all terminated employees was based on the fact that Pendleton was a probationary employee and was not typical of and would not adequately represent permanent employees of Crown. Memorandum and Order, Civil No. 78-1734 (D. Md. September 4, 1980) at 2. Likewise, the district court apparently denied on July 13, 1979, plaintiff Allen's motion for certification of a class of terminated employees. *Id.*, at 6. In his brief in the Fourth Circuit, Parker acknowledges that "[a]t a hearing on July 13, 1979, the Court denied class certification, and by Memorandum and

The fourth opportunity which Parker could have used to assert his claim would have been by moving to intervene in *Pendleton* after class certification was denied on September 4, 1980. However, rather than moving to intervene in the *Pendleton* case in order to take advantage of the *American Pipe* tolling doctrine, Parker filed the instant separate lawsuit. Finally, Parker could have moved to intervene in the *Pendleton* case within thirty days of the order of dismissal in that case in order to challenge on appeal the denial of class certification. In *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), this Court held that a motion to intervene in order to appeal the denial of class certification was timely when filed within the thirty-day period for taking an appeal from the entry of final judgment.[7] Parker did seek to intervene in the *Pendleton* case for purposes of challenging the denial of class certification, and the district court granted intervention, but Parker failed to file the appeal in a timely manner.

Given the various ways in which Parker could have exercised his rights under Title VII, his failure to do so can only be attributed to the fact that he "slept

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Order dated September 4, 1980, it reiterated its prior rulings after a Motion to Reconsider the class rulings by Allen and Pendleton." Brief of Appellant at 2. Thus, it would appear that all class claims relating to terminated permanent employees, of which Parker was a putative member, were denied on July 13, 1979. Parker's failure to take *any* action to assert his termination claim within ninety days of class certification denial would apparently render the later assertion of any termination claim by him untimely. In any event, the filing of a motion to reconsider the denial of class certification would not toll the running of the ninety-day period.

[7] *See* Fed. R. App. P. 4(a).

on his rights," *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965), and not to any deficiency in the alternatives available to him for asserting his claim. These alternatives provide a wholly adequate means for the assertion of Title VII rights, without extending the *American Pipe* rule to separate actions.

C. Substantial Policy Reasons Favor Denying Tolling to Those Who File Separate Actions After Class Certification is Denied

Important goals of litigative efficiency and economy are served by limiting tolling to putative class members who seek to intervene after class certification is denied. Since the rule adopted by the Fourth Circuit presents serious problems of judicial administration and since that rule is unnecessary to protect the rights of Title VII litigants, any such extension of the *American Pipe* tolling rule should be rejected by this Court.

Since putative class members, who otherwise would be time-barred, are in effect "riding" the filing date of the named plaintiff in the proposed class action, it is not unreasonable to limit the putative class members to intervention in that original action once class certification is denied. Such a limitation, while not interfering with putative class members' ability to assert their claims, has advantages not present when separate actions are allowed. Since the trial judge in the original action is familiar with the facts, efficiency of judicial administration is served by having that judge handle the claims of putative class members as well. In addition, the original trial judge will be in a position to make informed decisions on the timeliness of putative class members' motions to intervene as well as to resolve any questions of adequate

notice to defendants which might arise. *See American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring).

The rule adopted by the Fourth Circuit, however, may foster the very problem of "one-way intervention" which Rule 23 was designed to eliminate. Under former Rule 23 prior to its amendment in 1966, the so-called "spurious" class action often led to "one-way intervention." This Court in *American Pipe*, 414 U.S. at 547, described the problem under former Rule 23 as follows:

> A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment.

A similar form of "one-way intervention" would be encouraged by the Fourth Circuit rule. Under such a rule, putative class members would be allowed to seek to intervene if they believed the litigation or judge was likely to produce a favorable result, or file a separate action should the litigation take an unfavorable turn. Thus, the Fourth Circuit rule would allow a form of the "one-way intervention" which Rule 23 was designed to eliminate. In addition, the Fourth Circuit rule will likely do additional damage to the purposes underlying Rule 23 by encouraging putative class members to abandon the class and file separate actions when class certification is denied,

rather than intervening for purposes of challenging the denial of class certification when final judgment is entered.

Another serious problem presented by the Fourth Circuit rule is that of "overlapping class actions" filed in separate actions by putative class members. Such an overlapping would occur where a putative class member, taking advantage of tolling, files a separate class action. Not only could this lead to an indefinite tolling of the limitations period, it also would provide putative class members with multiple opportunities to attempt to secure certification of the same or similar class which was denied in the original action. Such overlapping suits are not only inconsistent with the relatively short time periods established under Title VII but also are inconsistent with the purposes underlying Rule 23.[8] For example, permitting the commencement of potential additional class actions of as-yet undetermined scope would improperly deny a defendant in the initial class action of

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[8] The serious problems that may arise from such "overlapping class actions" is illustrated by the case of *Lane v. Bethlehem Steel Corp.*, 93 F.R.D. 611 (D. Md. 1982). *Lane* was filed as a class action in 1971 alleging various discriminatory practices at Bethlehem's plant at Sparrow's Point, Maryland. A decision to deny class certification was not made by the district court until 1981. Following denial of class certification, and settlement of the named plaintiffs' claims, four putative class members moved to intervene in the *Lane* action for purposes of appealing the denial of class certification. 93 F.R.D. at 613. In addition, the same four putative class members filed a *separate class action* entitled *Davis v. Bethlehem Steel Corp.*, Civil No. M-82-3255 (D. Md.), in which they sought to represent a class of over nine hundred persons. If this class is certified, Bethlehem would have to defend against claims going back as far as 1967.

notification of "the substantive claims being brought against them, [and] also the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 555.

A rule limiting tolling to those putative class members who timely seek to intervene in the original action after class certification is denied provides a means by which Title VII claimants adequately can assert their claims, while furthering the important goals of litigative efficiency and economy. Since the Fourth Circuit rule has substantial drawbacks, including the likelihood of "one-way intervention" and overlapping class actions, and since it is not necessary to effectuate the purposes of the *American Pipe* tolling doctrine, the Fourth Circuit rule should be rejected.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1982

CROWN, CORK & SEAL CO., INC., *Petitioner*,

v.

THEODORE PARKER, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN SUPPORT OF RESPONDENT BY JACK WILLIAMS AND JERRY POWELL AS *AMICI CURIAE*

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QUESTIONS PRESENTED

Does the pendency of a proposed class action toll the statutes of limitations for all members of the proposed class?

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BRIEF IN SUPPORT OF RESPONDENT BY JACK WILLIAMS AND JERRY POWELL AS *AMICI CURIAE*

Jack Williams and Jerry Powell submit this Brief as *amici curiae* with the consent of both parties hereto.[1] Jack Williams and Jerry Powell urge this Court to follow the intent of this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) *rehearing denied* 415 U.S. 952 (1974) and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), and allow the tolling of the statute of limitations on behalf of all putative class members who may desire to, or by necessity be required to, bring independent causes of action.

[1] Jack Williams and Jerry Powell submit with this Brief two letters of consent, one from each party to this appeal, copies of which are found in the accompanying Addendum.

INTEREST OF AMICI CURIAE

Jack Williams and Jerry Powell are two of the numerous plaintiffs who were sellers of wheat to Continental Grain Company ("Continental") in 1972 involved in an antitrust action coordinated for discovery and pre-trial purposes before the Honorable Frederick Daugherty, United States District Judge, under the style of *In Re Wheat Farmers Antitrust Class Action Litigation*, M.D.L. No. 452 (W.D. Okla).

In 1972 Joe Zinser and John Spearman filed separate class actions[2] in United States District Court for the Northern District of Texas, alleging that Continental and Clarence Palmby had combined and conspired to violate the antitrust laws in the wheat market and the sale of wheat to the Soviet Union in 1972.

The two actions were consolidated by the Judicial Panel on Multidistrict Litigation for discovery and pre-trial proceedings in the United States District Court for the Western District of Oklahoma where a similar suit, *Cleveland* v. *Palmby*, CIV-72-731 (W.D.Okla. filed Oct. 24, 1972), also a class action, was pending.[3]

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[2] *Zinser* v. *Continental Grain Company*, No. CA2-1309 (N.D.Texas) ("Zinser") was filed on November 16, 1972, on behalf of certain Texas wheat farmers; *Spearman* v. *Continental Grain Company*, No. CA2-1303 (N.D.Texas) ("Spearman") was filed on January 2, 1972 on behalf of certain New Mexico wheat farmers.

See also, Zinser v. *Continental Grain Company*, No. 81-1021 (Petition for Writ of Certiorari filed December 1, 1981).

[3] *See In Re Wheat Farmers Antitrust Class Action Litigation*, 366 F. Supp. 1087 (J.P.M.L. 1973).

On June 30, 1975, the trial court certified the classes in each of the three lawsuits. Notice was given to class members in December of 1975. Discovery on the merits progressed until, in 1977, this Court rendered its decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977).

On June 25, 1979, the trial court entered an order holding, *inter alia*, *Illinois Brick* applied to all the claims in all three cases, and determining that *Illinois Brick* precluded antitrust claims brought by those who did not sell directly to Continental. Accordingly, the district court entered an order dismissing from the classes certified in these actions those members who did not sell directly to the conspirators; reevaluated the propriety of affording the litigation class action treatment and found that the classes remaining did not meet the numerousity requirement of Fed. R. Civ. P. 23(a)(1); and entered an order and judgment dismissing the action without prejudice. After entertaining motions and entering an order, final judgment was entered, enforcing the court's order on November 13, 1979, which dismissed all indirect sellers with prejudice and all direct sellers without prejudice. No notice of the dismissal was provided to the certified class members; the trial court enforced a local rule, of the type found unconstitutional by this Court in *Gulf Oil Company* v. *Bernard*, 452 U.S. 89 (1981), preventing the attorneys from communicating with putative class members and informing members of their rights; and, since the named class representatives were indirect sellers, substitute parties, Messrs. Williams and Borden, were only allowed to intervene for purposes of the class issue, and their claims were subsequently dismissed without prejudice. The litigation accordingly ceased its existence on the district court level.

The United States Court of Appeals for the Tenth Circuit affirmed,[4] and this Court denied the petition for a writ of certiorari.[5]

On October 14, 1980, a class action was filed in the United States District Court for the Northern District of Texas by the parties who, in 1979, sought to intervene in the *Zinser* and *Spearman* cases, each presenting identical claims as asserted in the original actions and seeking to represent as a class direct sellers to Continental.[6] By order of June 12, 1981, the class issues were dismissed.

Subsequent to the Court's ruling in *Gulf Oil Company* v. *Bernard*, 452 U.S. 89 (1981) the trial court permitted communications and eighty-one individuals sought intervention into the *Williams* litigation. By order of October 21, 1982, leave to intervene was granted. On March 26, 1981, Continental filed a motion to dismiss on the grounds that the action was barred by the statute of limitations claiming that, since no intervention was had in the *Zinser* and *Spearman* cases, all the named and intervening plaintiffs in *Williams* lost their claims by the filing of a new action after the dismissal without prejudice. The motion is currently *sub judice*.

Both Jack Williams and Jerry Powell do not have a direct interest in the outcome of this appeal; rather, their interest in the *Williams* case may be affected by this

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[4] *Zinser* v. *Continental Grain Company*, 660 F.2d 754 (10th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1434 (1982).

[5] *Zinser* v. *Continental Grain Company, No. 81-1021*, ___ U.S. ___, 102 S.Ct. 1434 (1982).

[6] *Williams* v. *Continental Grain Company, No. CA2-80-202*, (N.D.Texas, filed October 14, 1980) ("Williams").

appeal's outcome. Jack Williams was a party seeking to intervene as a substitute class representative in *Zinser* and is a named plaintiff in the *Williams* case. Jerry Powell was a class member in *Zinser* and is an intervenor in the *Williams* case.

In addition, Jack Williams and Jerry Powell respectfully submit this brief as *amici curiae* to the Court to express their interests in the issue of tolling the statute of limitations for putative class members from the perspective of antitrust plaintiffs desirous of opposing any possible deterioration of existing Rule 23 mechanisms and putative class members' rights.

SUMMARY OF ARGUMENT

The issue presented in this appeal is whether the Court should accept a restrictive interpretation of *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, *rehearing denied* 415 U.S. 952 (1974) and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), requiring mandatory intervention into the pending class action litigation as the only means of affording a putative class member the right to toll the statute of limitations. *Amici curiae* Jack Williams and Jerry Powell respectfully submit that it does not offend, but rather advances, the equitable principles and policy reasons of *American Pipe* and *Eisen* by allowing a putative class member to protect his or her claim by the filing of a separate lawsuit. Such an inflexible and constrained policy as suggested by Petitioner is contrary to equitable principles where a party opposing class certification is given notice and is fully cognizant of the claims of putative class members. Petitioner's position ignores the potential problems associated with a rigid requirement providing a putative class member, with peculiar factual circumstances, with only one method of ventilating his or her claim. Allowance of intervention as

the sole mechanism for a putative class member to avail oneself of the tolling of the statute of limitations may open a Pandora's box of further procedural complexities and due process problems.

ARGUMENT

I. The Equitable Principles Of *American Pipe* Apply With Equal Force When A Putative Class Member Seeks To Initiate Separate Proceedings.

Since the statutes of limitations are designed to enforce the maxim "*vigilantibus non dormientibus acquitas subvenit*"[7] and "to promote justice by preventing surprise through revival of claims that have been allowed to slumber until evidence has been lost, memories faded and witnesses have disappeared," *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), the Court, in *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, *rehearing denied* 415 U.S. 952 (1974), addressed the issue of the tolling of statutes of limitations by the filing of a class action by stating:

> The policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941, are satisfied, when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.

Id. at 554-55. Accordingly, the Court applied these equitable principles and found that the commencement of a

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[7] "Equity aids the vigilant, not those who slumber on their rights."

class action tolls the running of the statute for all putative class members who would have been parties had the action been permitted to continue under Federal Rule Civil Procedure 23. *Id.* at 554.

The Court further expanded these principles in, albeit *dictum*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 117 n. 13 (1974):

> Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

The equitable principles espoused by the Court in *American Pipe* and *Eisen* are consistent with the design of the statute of limitations. By the filing of a class action, the defendant has been given notice of the "essential information necessary to determine both the subject matter and the size of the prospective litigation . . ." 414 U.S. at 555. Federal Rule of Civil Procedure 23 mandates that the class action issue be determined "[a]s soon as practicable after the commencement of an action." Fed.R.Civ.P. 23(c)(1). By the time the motion for certification is ripe for determination, the party opposing certification is not only informed of the number of putative class members but is aware of the members identities, of their substantive claims and of the potential exposure for the individual claims of the class members.[8] A defendant opposing class

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[8] *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395, *rehearing denied*, 434 U.S. 989 (1977); *McCarthy* v. *Kleindienst*, 562 F.2d 1269,

certification cannot later be heard to cry "stale claim" and attempt to invoke the limitations defense when a previously identified putative class member seeks to intervene. There can be no surprise. 414 U.S. at 555. *Accord, Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1097 n. 19 (3rd Cir. 1975); *Sanders* v. *John Nuveen & Co., Inc.*, 524 F.2d 1064, 1074 n. 28 (7th Cir. 1975) *vacated on other grounds sub nom. John Nuveen & Co., Inc.* v. *Sanders*, 425 U.S. 929 (1976), *cert. denied*, 450 U.S. 1005 (1981); *Trim* v. *Restaurant Marketing Associates, Inc.*, 28 F.R.Serv.2d 683 (N.D.Cal. 1979).

Petitioner suggests that the *only* means of preserving the right to toll the statute of limitations is to intervene in the pending lawsuit brought as a class action. It is proffered that any other action by a putative class member dispenses with the member's rights as preserved in *American Pipe* and *Eisen*. However, such restrictive reading of *American Pipe* and *Eisen* is tantamount to advancing form over substance. *American Pipe* emphatically preserved the tolling right of putative members to intervene in the class action. Under the Court's rationale, the tolling of the statute of limitations for one putative class member tolls the limitations statute for all members regardless of any subsequent and unrelated action taken by the putative class member. Accordingly, when the statute is tolled for intervention purposes, the same equitable rationale extends to any other filing purpose. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 176 n. 13.[9]

1273-74 (D.C.Cir. 1977); *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 335 (C.D.Cal. 1981); *Trim* v. *Restaurant Marketing Associations, Inc.*, 28 F.R.Serv.2d 683 (N.D.Cal. 1979).

[9] *See Parker* v. *Crown, Cork and Seal Co., Inc.*, 677 F.2d 391 (4th Cir. 1982), *cert. granted*, No. 82-118 (Nov. 8, 1982); *Nguyen Da Yen*

Federal Rule of Civil Procedure 23(c)(2)(A) affords an analogous situation where a putative class member "opts out" of the litigation, and is still afforded the protection of tolling the limitations statute. *Appleton Electric Company* v. *Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), *cert. denied* 451 U.S. 976 (1981). Under Rule 23(c)(2)(A), either the opt out can lay to rest his claim, or timely file his own action without confronting the statute of limitations bar. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 176 n.13.[10] Holding that putative class members

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v. *Kissinger*, 602 F.2d 925 (9th Cir. 1979); *Saitterwhite* v. *City of Greenville*, 578 F.2d 987, 996-97 (5th Cir. 1978) *vacated on other grounds*, 445 U.S. 940 (1980); *Sanders* v. *John Nuveen & Co., Inc.*, 524 F.2d 1064, 1074 n.28 (7th Cir. 1975); *Issen* v. *GSC Enterprises, Inc.*, 538 F. Supp. 745, 754 (N.D.Ill. 1982); *Laventhall* v. *General Dynamics Corporation*, 91 F.R.D. 208, 210 (E.D.Mo. 1981); *Gramby* v. *Westinghouse Electric Corporation*, 84 F.R.D. 655, 662 (E.D.Pa. 1979); *Green* v. *United States Steel Corporation*, 481 F. Supp. 295, 299 (E.D.Pa. 1979); *Trim* v. *Restaurant Marketing Associates, Inc.*, 28 F.R.Serv.2d 683 (N.D.Cal. 1979); *Galloway* v. *American Brands*, 81 F.R.D. 580, 588 (E.D.N.C. 1978); *Parker* v. *Bell Helicopter*, 78 F.R.D. 507, 513 n.2 (N.D.Texas 1978); *Nelson* v. *United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D.La. 1978); *In Re Home-Stake Production Company Securities Litigation*, 76 F.R.D. 337, 345 (N.D.Okla. 1975). *E.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 402 (1977) (Powell, J., dissenting); *Pavlak* v. *Church*, 681 F.2d 617, 621-22 (9th Cir. 1982) (Norris, J., dissenting), *petition for cert. docketed*, No. 82-650 (filed Oct. 12, 1982).

[10] *See Duran* v. *Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607, 610 (D.Ariz. 1982); *McAlpine* v. *AAMCO Automotive Transmissions, Inc.*, 24 F.R.Serv.2d 275, 276-77 (E.D.Mich. 1977); *Bantolina* v. *Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n.19 (D.Hawaii 1976); *Agostine* v. *Sidcon Corp.*, 21 F.R.Serv.2d 329, 338 n.13 (E.D.Pa. 1975). *Cf. Pavlak* v. *Church*, 681 F.2d at 621-622 (Norris, J., dissenting).

must intervene into the pending action would defeat the opt-out provision of Fed.R.Civ.P. 23(c). For the purpose of tolling the statute of limitations, there is no rationale for distinguishing treatment of a putative class member seeking to initiate suit from that of a traditional opt-out who seeks to initiate suit; the equitable principles of tolling apply equally.[11]

II. The Factual Circumstances Of Potential Class Action Litigation Is Repugnant To Inflexible Application Of An "Intervention Only" Rule.

Respondent advances a strict and limited application of the tolling principle of *American Pipe*—failure to intervene, at any point in the litigation, mandates a bar to the claim by the statute of limitations, regardless of the circumstances of the litigation and defendant's knowledge of the putative class member's identity. Situations peculiar to each pending litigation, however, dictate the necessity of a flexible principle which would allow either intervention or initiation of a new suit.

One such instance is where intervention is denied. Since Respondent's intended mandatory intervention would require a motion under Federal Rule of Civil Procedure 24(b), the putative member of the class would have to weigh a decision to run the risk of a denial of a motion for permissive intervention (a motion which, during deliberation by the district court, would not toll the

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[11] As to concerns for assuring "effectuation of the purposes of litigative efficiency and economy" of Fed.R.Civ.P. 23, *American Pipe and Construction Co.* v. *Utah*, 414 U.S. at 556, the Judicial Panel on Multidistrict Litigation has ample procedures and rules affording consolidation for discovery and pre-trial proceedings. 28 U.S.C. § 1407, *et seq.* (1976).

limitations statute) or filing a new action which would toll the statute. *See American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 561 (1974), *rehearing denied*, 415 U.S. 952 (1977) (Blackmun, J., dissenting) ("Nor does [our decision] necessarily guarantee intervention for all members of the purported class."); *J.H. Cohn & Co.* v. *American Appraisal Associates, Inc.*, 628 F.2d 994, 996 (7th Cir. 1980) (reversal of district court's dismissal of new action, after intervention into first action had been denied).

Nor would mandatory intervention advance the equitable principles of *American Pipe* in situations involving dismissal of the class action. Where the district court dismisses all claims, the putative class members are left with no alternative but to file an independent action or be barred by the statute of limitations.[12] The rationale for tolling the statute of limitations as to all putative members, regardless of subsequent action taken for protection of their claims, applies.[13]

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[12] Such was the situation involving these *amici curiae*. When Mr. Williams sought intervention but was denied, he had no alternative but to file an independent action since all claims by indirect sellers to Continental, under *Illinois Brick*, were dismissed without prejudice. By ordering dismissal without prejudice, the Court, in essence, invited the initiation of the *Williams* action.

Mr. Powell, along with the other putative class members, was not notified of the dismissal without prejudice and only became aware of the *Williams* case after the Court decided *Bernard* and the district court allowed communications with the putative class members.

[13] *See, generally, Sussman* v. *Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1981); *Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318, 1540-41 (1976).

Putative class members reliance on the maintenance of the class action would be compromised by dismissal of the class claims, before or after certification, where no notice of the dismissal was provided,[14] or communications with the putative class members prohibited.[15]

Moreover, dismissal, settlement or compromise of the class suit, without notice to putative class members, would be detrimental to those persons who relied upon the class action as the primary means of vindicating their legal claims.[16]

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[14] *Cf. Laventhall* v. *General Dynamics Corporation*, 91 F.R.D. 208, 210 (E.D.Mo. 1981) (no pre-certification notice needed where putative members are not prejudiced); *Pruitt* v. *Allied Chemical Corp.*, 28 F.R.Serv.2d 903, 922 (E.D.Va. 1980) (statute of limitations will be tolled "where there was apparent relevance by the absent class members on the pendency of the purported class action."); *In Re Home-Stake Production Company Securities Litigation*, 76 F.R.D. 337 (N.D.Okla. 1975) (putative class members allowed to file independent claims without being barred by limitations when claims founding the original class action were settled); *Buford* v. *American Finance Company*, 333 F. Supp. 1243, 1252 (N.D.Ga. 1971) (court allows putative class members to prove reliance on class action in order to save claims from limitation statute).

[15] *See Gulf Oil Company* v. *Bernard*, 452 U.S. 89 (1981).

[16] *See Nguyen Da Yen* v. *Kissinger*, 602 F.2d 925 (9th Cir. 1979); *Muntz* v. *Ohio Screw Products*, 61 F.R.D. 396, 398 (N.D.Ohio 1973); *Rothman* v. *Gould*, 52 F.R.D. 494, 496 (S.D.N.Y. 1971); *Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D.Ill. 1970); Comment, *Involuntary Dismissals of Class Actions*, 40 U.Chi.L.Rev. 783, 801-04 (1973). *See, generally, Pearson* v. *Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975) (court recognized the pendency of three actions brought by members of the putative class).

Mandatory intervention would also not be warranted in an alleged class action where the named class representatives could not adequately represent the putative class,[17] where the interests of the named and putative class parties are antagonistic or in conflict,[18] where the putative class members claims are not included in the certified class or certification is denied,[19] or where the inclusion of a claim was denied due to its lack of commonality to other putative class members.[20] The claims of the putative class

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[17] *See generally, Woodson* v. *Fulton*, 614 F.2d 940, 942 (4th Cir. 1980) (definition of the scope of the class precludes Woodson's claim and, therefore, his independent action will be preserved); *Gramby* v. *Westinghouse Electric Corporation*, 84 F.R.D. 655, 662 (E.D.Pa. 1979) (second class action not barred by limitations where claims of second class action's members were excluded from the original certified class action by court); *Dickerson* v. *United States Steel Corp.*, 22 F.R.Serv.2d 866, 868 (E.D.Pa. 1976) (where putative class members were excluded from class, court will provide notice of exclusion).

[18] *See, generally, Pruitt* v. *Allied Chemical Corp.*, 28 F.R.Serv.2d 903, 922 (E.D.Va. 1980) (putative class members who were excluded from class for reasons of manageability will be able to avail themselves of the toll of the limitations statute afforded by class action filing); *Parker* v. *Bell Helicopter Co.*, 78 F.R.D. 507, 513 n.2 (N.D.Texas 1978) (unrepresented members could initiate own action).

[19] *See, generally, Chisholm* v. *United States Postal Service*, 665 F.2d 482, 490-91 (4th Cir. 1981); *J.H. Cohn & Co.* v. *American Appraisal Associates, Inc.*, 628 F.2d 994 (7th Cir. 1980); *Wetzel* v. *Liberty Mutual Insurance Company*, 508 F.2d 239, 246 (3rd Cir. 1975), *cert. denied sub nom. Liberty Mutual Insurance Company* v. *Wetzel*, 421 U.S. 1011 (1975); *Hellerstein* v. *Mather*, 360 F. Supp. 473 (D.Colo. 1973), *appeal dismissed sub nom. Hellerstein* v. *Mr. Steak*, 531 F.2d 470 (10th Cir. 1976).

[20] *See, generally, Woodson* v. *Fulton*, 614 F.2d 940 (4th Cir. 1980). *Cf. Chisholm* v. *United States Postal Service*, 665 F.2d 482, 490-91 (4th Cir. 1981) (named plaintiff's claim is dismissed from that of the class due to the claim's final agency determination).

members may be such as to require that peculiar actions to be taken prior to the filing of a complaint in district court, such as exhaustion of administrative remedies.[21] In such instances, timely filing of a motion to intervene would long pass by the time the putative class member had exhausted all remedies, and the litigation either progressed to an advanced state or concluded, warranting denial of Federal Rule of Civil Procedure 24(b)'s discretionary intervention.

Not only is mandatory intervention not warranted, but it would be contrary to Federal Rule of Civil Procedure 24(b)'s discretionary intervention, and would effectively deny a putative class member his or her "day in court," resulting in a denial of due process and equal protection.

The "intervention only" rule's faults appear most egregious when applied to litigation of the nature in which these *amici curiae* are involved. Petitioner's compulsory intervention would deprive putative class members in *In Re Wheat Farmers Antitrust Class Action Litigation*, M.D.L. 129 and M.D.L. 452, of their right to assert claims against Continental Grain Company, even though the initial class actions were filed within one year of the circumstances giving rise to the causes of action, and the defendant knew the identity of the class members who sold directly to Continental. Petitioner's position is further compounded by its inequitable application to the unique facts of the *Wheat* case.

The litigation in which these *amici curiae* are participating involve three categories of party-plaintiffs: two

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[21] *Luevaro* v. *Campbell*, 93 F.R.D. 68, 91 (D.D.C. 1981); *Barrett* v. *United States Civil Service Commission*, 439 F.Supp. 216 (D.D.C. 1977).

named plaintiffs who sought to intervene in the prior proceeding, but who were denied intervention; eighty-one intervenor-plaintiffs who were denied information of, and denied the opportunity to intervene in, the prior proceeding, but upon being informed timely sought to intervene; and over two hundred other individuals who either have been informed of their rights and have chosen not to participate, or still have not been contacted and informed of their rights in the litigation. To apply Petitioner's suggestion of compulsory intervention to the *Wheat* case would result in the evaporation of claims which the district court had ruled were dismissed without prejudice to file anew. The consideration given by the district court in the dismissal without prejudice was that those putative class members who wished to pursue their claims against the defendant would be given that opportunity in another lawsuit.

Mr. Williams attempted to informally intervene, and in fact was treated as a substitute representative for the class action, but, after reconsideration of the class action issue, his action was dismissed without prejudice. Mr. Powell was notified, pursuant to the district court's order, that he was a member of the certified class and afforded the opportunity to opt-out. He chose to participate, and subsequently was not informed that the class was later decertified, and his claim was dismissed without prejudice until the court of appeals reversed the trial court's enforcement of a local rule prohibiting communications with class members. *Zinser* v. *Continental Grain Company*, 660 F.2d at 762.

While the equitable principles tolling the statute of limitations announced in *American Pipe* would emphatically apply in the situation involving these *amici curiae*, it would be inappropriate to apply Petitioner's

inflexible suggestion without consideration of the consequences the many unforeseen, inequitable applications will have on a putative member's right to bring suit.

Any decision to limit the alternatives of a putative class member would involve substantial changes of policy in Federal Rules of Civil Procedure 23 and 24, and the putative class member's due process and equal protection rights. On balance, the principles of allowing initiation of a new suit by a putative class member outweigh the limited considerations warranting an "intervention only" rule where the defendant is fully apprised well in advance of the claims of the putative class member.

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring that a putative class member's rights are not eroded, the *amici curiae* respectfully request that the Court affirm the opinion of the Fourth Circuit Court of Appeals and deny Petitioner's request for an "intervention only" policy.

Respectfully submitted,

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December 10, 1982

James E. Elliott, Esquire
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Re: Crown, Cork & Seal Co., Inc.
v. Parker
Supreme Court No. 82-118

Dear Mr. Elliott:

I have your letter dated December 4, 1982 requesting permission to file an amicus curiae brief. Please accept this letter as the consent of petitioner, Crown, Cork & Seal Co., Inc. to file an amicus curiae brief on behalf of your clients (whom I understand to be a plaintiff and an intervenor) in the case of Williams v. Continental Grain Company, Civil No. 81-362 (W.D.Okla.).

Sincerely,

Richard J. Magid

RJM/kw

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December 16, 1982

James E. Elliott, Esq.
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Re: Crown, Cork & Seal Co., Inc. v. Parker; No.: 82-118

Dear Mr. Elliott:

I am enclosing copies of the briefs filed in the Fourth Circuit Court of Appeals in the above case. With this letter, I am hereby granting your law firm permission to file amici curiae brief in support of Mr. Parker's position in the United States Supreme Court.

Thank you for your assistance.

Sincerely,

Norris C. Ramsey

Norris C. Ramsey, P.A.

NCR:pc
Encl.

Office-Supreme Court, U.S.
FILED
[illegible] 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-118

In the Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC., PETITIONER

v.

THEODORE PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the filing of a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, suspends the running of the statute of limitations against the claims of the members of the asserted class until class certification is denied, so that they may file separate actions.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-118

CROWN, CORK & SEAL COMPANY, INC., PETITIONER

v.

THEODORE PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission has primary responsibility for enforcing Title VII of the Civil Rights Act of 1964. Private enforcement of Title VII, in the form of both individual suits and class actions (see *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405 (1977)), is an important adjunct to the Commission's efforts. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The resolution of the question presented by this case will significantly affect the availability of individual actions and the efficacy of class actions under Title VII.

STATEMENT

1. Respondent was an employee of petitioner until July 15, 1977, when he was discharged. On October 3, 1977, respondent filed a charge with the Equal Employ-

ment Opportunity Commission, alleging that petitioner had harassed him and then discharged him because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Commission conducted an investigation and, finding no reasonable cause to believe that respondent's charge was true, notified him of his right to sue. Pet. App. 3a, 10a-11a.

The Commission issued this notification on November 9, 1978. Pet. App. 3a. Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), provides that "within ninety days after the giving of such notice a civil action may be brought against the [party] named in the charge * * * by the person claiming to be aggrieved."

While the Commission was investigating respondent's charge, however, and before it issued the right to sue letter to respondent, two other black former employees of petitioner—Randy Pendleton and Marvin Allen—filed a Title VII class action against petitioner in the United States District Court for the District of Maryland. *Pendleton* v. *Crown, Cork & Seal*, Civil Action No. K-78-1734. See Pet. Br. App. 1a-6a. The complaint in *Pendleton* described the plaintiff class as the class of "black persons who have been, continue to be and who in the future will be denied equal employment opportunities by defendant on the grounds of race or color" (Pet. Br. App. 2a). After discovery, Pendleton sought to represent a class of black employees who, on or after January 12, 1973, could have filed a charge that they were discharged because of their race. Allen sought to represent a class of employees who, on or after March 31, 1973, could have filed a charge of racially discriminatory discharge, job assignment, retaliation, or harassment. Pet. Br. App. 7a. Respondent was a member of both classes. Pet. App. 3a.

The *Pendleton* class action was pending—and the district court had not decided whether to certify it as a class action—when the 90-day period that began with

respondent's receipt of the right to sue letter elapsed. On September 4, 1980, "[a]fter substantial discovery" (Pet. Br. App. 18a), the district court finally denied class certification in *Pendleton*. Pet. App. 3a. The court found that under petitioner's collective bargaining agreement, Pendleton was "a probationary employee rather than one with seniority rights" (Pet. Br. App. 9a; emphasis omitted). Because the class Pendleton sought to represent included employees with seniority rights, the court ruled that Pendleton's claim was not "typical of the claims * * * of the class" as required by Fed. R. Civ. P. 23(a)(3), and that Pendleton would not "fairly and adequately protect the interests of the class" as required by Fed. R. Civ. P. 23(a)(4). See Pet. Br. App. 9a-12a. The court ruled that Allen could not represent a class claiming racially discriminatory harassment because "[e]xcept for some nonspecific allegations * * * [he had] produced little suggesting the existence of a class so numerous that joinder is impracticable" (Pet. Br. App. 17a; see Fed. R. Civ. P. 23(a)(1)) and because Allen had "not demonstrated that [his] harassment claims are typical of claims held by the putative class" (Pet. Br. App. 17a).

2. Fifty-three days after class certification was denied in *Pendleton*, respondent brought this action, also in the United States District Court for the District of Maryland, claiming that he was harassed and discharged because of his race. Pet. App. 4a.[1] Respondent did not claim to represent a class. Petitioner moved for summary judgment, asserting that respondent's com-

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[1] The *Pendleton* action was dismissed, pursuant to a settlement agreement, in March 1981. Respondent exercised his right under *United Airlines* v. *McDonald*, 432 U.S. 385 (1977), to file a post-judgment motion to intervene in *Pendleton* for the purpose of appealing the denial of class certification. This motion was granted (Pet. Br. App. 18a-20a), but respondent did not file a timely notice of appeal. Pet. App. 4a n.1.

plaint was barred because it was filed more than 90 days after respondent received his right to sue notification.

The district court granted the motion. The court noted that under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), respondent could have intervened in the *Pendleton* action within 90 days after class certification was denied. The district court ruled, however, that "the benefit of the *American Pipe* tolling rule is limited to those class members who seek to intervene in the original class suit, and is inapplicable to independent suits on which the statute of limitations has otherwise run" (Pet. App. 15a).

The court of appeals reversed, stating that it would "exalt form over substance to say that intervention would be permitted but not institution of a new suit" (Pet. App. 6a). The court appeals explained (*ibid.*, quoting *Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1097 n.19 (3d Cir. 1975); brackets in original):

> The rationale of any statute of limitations is to put a defendant on notice of a claim with reasonable promptness so that defense evidence is not lost, memories have not faded and witnesses have not disappeared. * * * Where plaintiff's individual complaint is within the scope of the putative class action, those purposes are fully served since the defendant has "sufficient information within the statutory period to timely apprise [it] * * * of the nature and scope of the prospective litigation."

The court of appeals also reasoned that the district court's approach "would encourge the filing of individual suits * * * by members of the putative class while the issue of class certification was unresolved, adding additional burden and expense to the defendant" (Pet. App. 6a-7a; footnote omitted) because "[a] putative class member preferring an individual suit to joining the representatives of the class if it fails would be forced to file a protective action before the statute of

limitations had run on his individual claim" (*id.* at 6a n.3). Finally, the court of appeals pointed out that intervention can, and sometimes must, be denied, so that "the rule of *American Pipe*, if limited to intervenors, might achieve the inequitable result of allowing some putative members of the class to obtain an adjudiction of their claims while excluding others" (*id.* at 7a).

SUMMARY OF ARGUMENT

A. 1. This case is controlled by *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). *American Pipe* involved members of an asserted class who sought to intervene after class certification was denied; the Court held that the filing of the class action suspended the running of the statute of limitations on the asserted class members' individual claims. The Court reasoned that any other rule would force members of the asserted class to file protective intervention motions, thus bringing about precisely the inefficient multiplicity of litigation that class actions are intended to avoid. The Court also noted that the filing of the class action gave the defendant ample notice of the claims of the members of the asserted class; allowing those claims to be raised later was, therefore, not inconsistent with the policies underlying the statute of limitations.

Respondent is in the same position as the asserted class members who sought to intervene in *American Pipe*, except that respondent wishes not to intervene but to file a separate action. This distinction is plainly immaterial. Protective *complaints* filed by asserted class members who wish to pursue separate claims would be, if anything, more inefficient, more burdensome to defendants, and therefore more inconsistent with the purposes of the class action, than the protective intervention motions that *American Pipe* sought to render unnecessary. And a party in respondent's po-

sition might have many reasons for filing a separate action instead of intervening. He might decide that if he is to incur the expense and burden of litigating an individual claim, he wants to control the entire litigation; he might want the case litigated in another district, for example, or he might not want his claim considered in conjunction with those of the remaining parties to the failed class action.

At the same time, delay pending the resolution of a class certification issue does not impair a defendant's ability to defend a claim brought in a separate action any more than it would affect the ability to defend the same claim raised by intervention. *American Pipe* held that this delay (while a class claim encompassing the individual claim is pending) is not inconsistent with the purposes of the statute of limitations.

2. In *Eisen*, the Court ruled that even if a class is certified, the filing of the class action suspends the limitations period until class members have had an opportunity to opt out and pursue their individual claims. It follows *a fortiori* that the limitations period should be suspended in favor of members of an asserted class that was not certified: they may have refrained from filing individual actions because they relied on the class action to protect their interests, and refusing to suspend the statute of limitations in their favor may therefore be unfair to them. No such concerns with fairness were involved in the ruling in *Eisen*, because a party who opts out of a certified class shows, by doing so, that he was not relying on the class action.

B. No policies counsel against suspending the statute of limitations in favor of a party in respondent's position. Indeed, petitioner does not identify any way in which it was prejudiced because respondent brought a separate action instead of intervening in *Pendleton*, and most of the policy arguments petitioner advances were rejected by the Court in *American Pipe*.

1. a. We know of no reason to believe that *American Pipe* gave rise to abuses, and the court of appeals' decision does not increase the risk of abuses. A district court has the authority to decide whether a particular claim, apparently filed out of time, was properly comprised in a timely class action. If a class claim were expanded artificially or in bad faith, a district court could properly determine that, to that extent, the class action did not suspend the statute of limitations for members of the asserted class.

b. A separate action, unlike a motion to intervene, can be brought in a different district from that of the failed class action; but while a defendant might prefer to have all related claims against it pending in one district, this is not an interest protected by the statute of limitations. Other procedures—such as those governing consolidation and multidistrict litigation—are available to deal with this concern where appropriate, and principles governing the running of statutes of limitations should not be distorted for this purpose.

c. Any concerns arising from the possibility that a class action might suspend the statute of limitations for a separate, subsequent *class* action need not be addressed here, since respondent sued only on his own behalf. In any event, the policies of *American Pipe* apply equally to separate class actions, and there are additional reasons for permitting a class action to suspend the statute of limitations for other class actions raising the same claims on behalf of the same claimants.

2. In several respects, the court of appeals' interpretation of *American Pipe* is particularly appropriate in Title VII cases. The administrative procedures that precede Title VII litigation ensure that a potential defendant will have very prompt notice—soon after the transactions in issue, and long before any suit is filed—that particular actions or policies are being challenged as discriminatory. Moreover, because the limita-

tions period for filing a Title VII suit is so short, a claimant must file suit promptly after class certification is denied; thus litigation of a class of claims will not be excessively protracted.

ARGUMENT

THE FILING OF A TITLE VII CLASS ACTION SUSPENDS THE RUNNING OF THE STATUTE OF LIMITATIONS AGAINST THE CLAIMS OF MEMBERS OF THE ASSERTED CLASS UNTIL CERTIFICATION IS DENIED, SO THAT THEY MAY FILE SEPARATE ACTIONS

A. This Court's Decisions Compel the Conclusion that the Statute of Limitations is Tolled for Members of the Asserted Class who Bring Separate Actions, as Well as for Those who Intervene After Class Certification is Denied

1. a. In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the State of Utah brought a class action under Section 1 of the Sherman Act, 15 U.S.C. 1, on behalf of various state and local government units. The action was brought 11 days before the statute of limitations expired. Almost 19 months later, the district court ruled that the suit could not proceed as a class action because the asserted class was insufficiently numerous under Fed. R. Civ. P. 23(a)(1). Eight days later, certain members of the class named in Utah's complaint sought to intervene; this Court held that the statute of limitations did not bar them from doing so.

The Court stated: "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. The principal reason for this rule, the Court said, is that otherwise members of the asserted class could protect their rights only by filing individual claims. This approach, the Court reasoned,

would defeat the purpose of the class action: "[a] federal class action is no[t] * * * 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. Refusing to suspend the statute of limitations in favor of the members of the asserted class "would deprive * * * class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553.

The Court also noted that suspending a statute of limitations between the filing of a class action and the denial of class certification "is in no way inconsistent with the functional operation of a statute of limitations." 414 U.S. at 554. By filing his complaint, the asserted class representative can "notif[y] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs * * *. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation * * *." *Id.* at 555.

Because allowing intervention could not prejudice the interests that the statute of limitations was intended to protect, the Court explicitly stated that "no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit." 414 U.S. at 551. The Court also emphasized that members of the class asserted in the complaint were not to be faulted for wait-

ing until class certification was denied before they acted to protect their rights. The Court explained (414 U.S. at 552, quoting Fed. R. Civ. P. 23(c)(1)):

> During the pendency of the District Court's determination * * * [of whether the suit shall proceed as a class action], which is to be made "as soon as practicable after the commencement of an action," potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established * * * does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it * * *.

b. The court of appeals' holding in this case follows directly from *American Pipe*. There is no dispute that respondent was an "asserted member[] of the [*Pendleton*] class who would have been [a] part[y] had th[at] suit been permitted to continue as a class action" (*American Pipe, supra*, 414 U.S. at 554). Since *Pendleton* was pending as a class action when respondent received his right to sue letter, the statute of limitations would not have begun to run against him, under the *American Pipe* approach, until class certification was denied; and there is no dispute that respondent sued within 90 days of that date. Apart from its cursory argument (Pet. Br. 24-26) that the 90-day limitation period is jurisdictional—an argument we answer at pages 21-23, *infra*—petitioner concedes that *American Pipe* would have allowed respondent to intervene at the time he brought his separate suit. The only question, therefore, is whether the rationale of *American Pipe* applies to members of the asserted class who choose to file separate actions as well as to those who intervene.

The rationale of *American Pipe* applies with at least equal force to a member of the asserted class who wishes to file his own suit instead of intervening. If the statute of limitations is not suspended in his favor, he will be forced to file a "protective" complaint; the result

would be to "deprive * * * class actions of the efficiency and economy of litigation which is a principal purpose of the procedure" (*American Pipe*, *supra*, 414 U.S. at 553) by "encour[aging the] filing of repetitious papers and motions" (*ibid.*). See *General Telephone Co.* v. *Falcon*, No. 81-574 (June 14, 1982), slip op. 7-8, quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion"). Indeed, the filing of a duplicative complaint while a potential class action is pending is significantly more inefficient than the filing of a motion to intervene. The filing of a separate complaint is likely to be more burdensome to the defendant; and a complaint may be filed in another district, thus forcing different courts to coordinate their proceedings.[2]

A member of an asserted class may have many reasons for filing a protective complaint instead of relying on his ability to intervene after the motion for class certification is denied. He may believe that if he is to incur the expense and burdens of litigating an individual

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[2] For this reason, petitioner is incorrect in asserting that the court of appeals' approach does not "effectuate the broad purposes of Rule 23" (Pet. Br. 16) by discouraging unnecessary litigation. Moreover, it is petitioner's approach, not the court of appeals', that would have the effect of "encouraging defections [from an asserted class] through the commencement of private suits" (Pet. Br. 13). It is also unclear what petitioner means by saying that *American Pipe* does not apply "where the purpose [is] to advance a private claim" (Pet. Br. 16); the purpose of the *American Pipe* rule is to ensure that parties legitimately concerned to protect their interests do not have an incentive to diminish the efficiency of the class action procedure, and the court of appeals' approach furthers this purpose. In any event, intervention advances a private claim in the same sense that filing a separate action does.

claim, he should have full control of the litigation; he may not want his claim considered in juxtaposition with the claims of the parties who filed the asserted class action, for example, or he may want to litigate in a different district from that in which the class action was brought. There is no reason to require a claimant who has such a view to file a protective complaint; under *American Pipe*, "potential class members are mere passive beneficiaries of the action brought in their behalf" with no "duty to take note of the suit or to exercise any responsibility with respect to it" until the class is certified (414 U.S. at 552).[3] It is "the denial of class status [that] is [the] 'critical point which puts putative class members on notice that they must act to protect their rights.'" *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 399 (1977) (Powell, J., dissenting), quoting *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 922 (7th Cir. 1976) (dissenting opinion).[4]

Moreover, suspending a statute of limitations in favor of a party who brings a separate action is no more inconsistent with the purposes of a limitations period than suspending it in favor of an intervenor. A statute of limitations is "'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it

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[3] Similarly, contrary to petitioner's suggestions (Pet. Br. 5, 22-23), it was both proper and reasonable for respondent to file a separate individual action while at the same time intervening in *Pendleton* for the purpose of challenging the denial of class certification. There was no assurance that a class action could ever be certified, and respondent presumably wished to have his own claim litigated should no class action be possible.

[4] The fact that there may sometimes be reason for suspending the statute of limitations until a later time, as in *McDonald* itself, does not make this observation less trenchant for present purposes.

is unjust not to put the adversary on notice to defend within the period of limitation * * *.'" *American Pipe, supra*, 414 U.S. at 554, quoting *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). For all of these purposes, it makes no difference whether a member of the asserted class litigates his claim by intervening or by filing a separate suit. Petitioner "was put on notice by the filing of the [*Pendleton*] complaint of the possibility of classwide liability" (*United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 395). The *Pendleton* complaint "notifie[d petitioner] not only of the substantive claims being brought against [it], but also of the number and generic identities of the potential plaintiffs" (*American Pipe, supra*, 414 U.S. at 555). Respondent's claim "'concern[ed] the same evidence, memories, and witnesses as the subject matter of the original class suit.'" *United Airlines, Inc.* v. *McDonald, supra*, 432 U.S. at 394 n.14, quoting *American Pipe, supra*, 414 U.S. at 562 (Blackmun, J., concurring).

Thus, "[w]ithin the period set by the statute of limitations, [petitioner had] the essential information necessary to determine both the subject matter" of respondent's claim and the fact that respondent was a potential plaintiff (*American Pipe, supra*, 414 U.S. at 555). Petitioner knew that it should preserve evidence bearing on precisely the claims that respondent asserts, and petitioner had no basis whatever for "repose" (*United States* v. *Kubrick*, 444 U.S. 111, 117 (1979)); it knew that its employment practices for the period that included respondent's employment and discharge were under challenge in court on grounds of racial discrimination.

2. Any doubt that the tolling rule of *American Pipe* extends to parties in respondent's position was removed by the Court's interpretation of *American Pipe* in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

In *Eisen* the Court held that in a certified Rule 23(b)(3) class action, "[i]ndividual notice must be sent to all class members whose names and addresses [can] be ascertained through reasonable effort" (417 U.S. at 173) so that, among other things, they may opt out of the class if they wish. In rejecting the suggestion that this rule should not apply if class members' individual claims would be barred by the statute of limitations, because they would then have no reason to opt out, the Court stated (*id.* at 176 n.13):

> This contention was disposed of by our recent decision in *American Pipe & Construction Co.* v. *Utah* * * * which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

Thus, under *Eisen*, the filing of a class action suspends the statute of limitations in favor of a member of a class that has been certified; it follows *a fortiori* that the statute must be suspended for a member of an asserted class that has not been certified. A class member who opts out will seldom be able to claim that he refrained from filing a separate action because he relied on the class action to represent his interests; by opting out of the certified class, he shows that he considers the class action an inadequate means of protecting his claim. By contrast, a party like respondent may well have been relying on the pending asserted class action. As we noted, *American Pipe* specifically did not require a plaintiff to show such reliance.[5] But where, as

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[5] The reasons that a claimant need not show reliance are implicit in the premises of *American Pipe*. First, because the filing of the asserted class action gives the defendant notice of all the claims it comprises, it is immaterial, for purposes of the statute of limitations, that some plaintiffs who have slept on their rights receive an "undeserved" opportunity to press their claims; the defendant can show no prejudice of the sort that a statute of limitations is intended to prevent. Second, if reliance

in the case of members of an asserted class that was not certified, it is possible that a claimant relied on the pendency of the class action, the danger of unfairness is a strong additional argument for suspending the statute of limitations.[6]

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were required, prudent claimants who *are* relying on the pendency of the asserted class action would be likely to file protective complaints or motions—thus defeating the purpose of the *American Pipe* rule—instead of incurring the risk that they will not be able to show reliance if the class is not certified. See *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1449-1450 (1976).

[6] Most of the courts that have addressed the issue appear to have agreed with the court of appeals that the filing of a class action tolls the statute of limitations for all members of the asserted class, irrespective of whether they intervene or file separate actions. See, *e.g.*, *Susman* v. *Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), cert. denied, 445 U.S. 942 (1980); *In re Fine Paper Litigation*, 632 F.2d 1081, 1087 (3d Cir. 1980); *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978), vacated on other grounds, 445 U.S. 940 (1980); *Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064, 1074 n.28 (7th Cir. 1975), vacated on other grounds, 425 U.S. 929 (1976). See also *Green* v. *United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979); *Nelson* v. *United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D. La. 1978); *Lilly* v. *Harris-Teeter Supermarket*, 545 F. Supp. 686, 705 (W.D.N.C. 1982); *Bantolina* v. *Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121 n.19 (D. Hawaii 1976); *McAlpine* v. *AAMCO Automatic Transmissions*, 24 Fed. R. Serv. 2d (Callaghan) 275, 276 (E.D. Mich. 1977); *Gramby* v. *Westinghouse Electric Corp.*, 84 F.R.D. 655, 662 (E.D. Pa. 1979). Petitioner (Pet. Br. 9 n.1) and amicus curiae Equal Employment Advisory Council (EEAC Am. Br. 13) are incorrect in suggesting that *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981), supports petitioner's view; in that case, class certification was granted, not denied, and the claimants who invoked *American Pipe* sought to intervene before the motion to certify a class was decided. See 650 F.2d at 346 n.7. Cf. pages 13-15, *supra*.

B. No Policies Counsel Against Suspending the Statute of Limitations for Members of the Asserted Class who File Separate Actions

1. At no point in its brief does petitioner identify any way in which it was prejudiced because respondent brought a separate action instead of intervening in *Pendleton*.[7] Moreover, most of the general policy arguments advanced by petitioner and amicus curiae Equal

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The Second and Ninth Circuits appear to have taken the position advanced by petitioner. *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), petition for cert. pending, No. 82-650; *Stull* v. *Bayard*, 561 F.2d 429 (2d Cir. 1977); *Arneil* v. *Ramsey*, 550 F.2d 774 (2d Cir. 1977). The opinions of the Second Circuit contain almost no explanation of the reasons for the result they reached. *Stull* simply followed *Arneil*. See 561 F.2d at 433. In addition, the suit held barred in *Stull* was a class action filed by a party who had acted as the attorney in the earlier class action, brought by his spouse. *Ibid.* Such a suit presents a variety of considerations not present here. See, *e.g.*, pages 19-20, *infra*.

The discussion of this issue in *Arneil* apparently was dictum, because the court appears to have ruled that an amended complaint asserting a class that included the plaintiffs who invoked *American Pipe* was not filed until after the limitations period had expired for those plaintiffs. See 550 F.2d at 782. The *Arneil* panel also seemed to assume, contrary to the Court's express statement in *American Pipe*, that the rule of that case would not apply if the asserted class members did not rely on the filing of the class action. See 550 F.2d at 783. See also page 21, *infra*.

The divided Ninth Circuit panel in *Pavlak* explained its conclusion by asserting that "[i]f a class member chooses to file an independent action, he or she may do so regardless of the pendency of the suit in which there is a motion to certify" (681 F.2d at 620); the panel majority did not explain why this was not equally true of intervenors, and why such an approach does not present the dangers of unnecessary litigation that the *American Pipe* rule is intended to avoid.

[7] Indeed, it appears that respondent sought to have his individual claim consolidated with the *Pendleton* suit—a course that would have been, from petitioner's point of view, indistinguishable from intervention—but petitioner opposed the motion to consolidate. See J.A. 1A.

Employment Advisory Council would apply equally to intervenors and were considered and rejected by the Court in *American Pipe*.[8] Nor does any other policy counsel against the adoption of the court of appeals' approach.

a. As Justice Blackmum noted in his concurring opinion in *American Pipe*, that decision does not constitute "encouragement to lawyers * * * to frame their pleading as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class." 414 U.S. at 561. Applying the *American Pipe* approach to members of the asserted class who file separate actions similarly does not create a danger of improper manipulation of limitations periods by counsel, because, as in the case of asserted class members who intervene (see *id.* at 561-562), district courts may invoke a variety of measures to guard against this danger. Cf. *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 333 (1980) ("The Title VII remedy is an equitable one; a court of equity should adjust the relief accordingly."). For example, a

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[8] This is true, for example, of petitioner's assertions that the court of appeals' rule "extend[s] statutes of repose for periods of time far beyond what legislatures have prescribed" (Pet. Br. 5) and that "[s]uch extensions will be substantial and will be automatically available to all individuals who are within the scope of a civil complaint brought as a class action" (Pet. Br. 5; see Pet. Br. 23).

Petitioner (*e.g.*, Pet. Br. 13-14) and amicus (EEAC Am. Br. 21) are obviously incorrect in suggesting that the court of appeals' approach will somehow revive the dangers of "one-way intervention" that Rule 23 was intended to remove (see *American Pipe*, *supra*, 414 U.S. at 547). If a class is certified, its members are bound by the judgment unless they opt out. If no class is certified, a party is bound by (and only by) the judgment entered on his claim—whether that claim is raised by a motion to intervene or a separate complaint.

district court has authority to determine whether a claim that would otherwise be barred is comprised within the claim raised on behalf of the asserted class in the earlier class action.[9] If the class claim were expanded artificially or in bad faith, the court should rule that, to that extent, it does not suspend the running of the statute of limitations, at least for members of the asserted class who did not rely in good faith on the pendency of the action. Moreover, if a class claim is plainly frivolous, the district court is likely to deny certification (or dismiss the claim) soon after it is filed; as a result, suspending the running of the statute of limitations while the suit is pending as a class action will have only a minimal effect.

In this case, of course, there is no suggestion that the *Pendleton* class action was brought in bad faith. On the contrary, the class certification question in *Pendleton* apparently proved to be highly complex and subtle; the Court noted in *American Pipe* that this will often be true. See 414 U.S. at 553. See also *General Telephone Co.* v. *Falcon*, *supra*, slip op. 12.

b. Amicus curiae Equal Employment Advisory Council suggests that the court of appeals' ruling will create unwarranted burdens because a separate complaint, unlike a motion to intervene, can be filed in a different district from that in which the asserted class action was brought. See EEAC Am. Br. 20; see also Pet. Br. 18. Respondent's action was brought before the same court (and judge) as *Pendleton*, so any arguments based on this consideration do not apply to this case.

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[9] This inquiry is not unfamiliar; it resembles the determination whether an amendment to a complaint relates back to the date of filing for limitations purposes. See Fed. R. Civ. P. 15(c); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1451-1454 (1976).

More generally, however, while a defendant might prefer to have all the litigation against it brought in the same court, or in the same action, this is not an interest that the statute of limitations protects, and tolling doctrines should not be designed to bring about such a result. The *delay* in filing a claim is equally burdensome to a defendant whether the claim is raised by intervention or by a separate action in another district, and only the burdens resulting from delay are properly considered in construing a statute of limitations. Any legitimate interest a defendant has in combining the claims against it in a single proceeding is protected by the procedures governing multidistrict litigation (see 28 U.S.C. 1407) and consolidation of cases (see Fed. R. Civ. P. 42(a)), not by the statute of limitations.

c. Finally, petitioner (Pet. Br. 24) and amicus (EEAC Am. Br. 22) urge that tolling the statute of limitations in favor of a separate *class* action will lead to untoward results. Respondent, of course, did not attempt to bring a class action; thus to the extent that separate class actions create special concerns, the application of the court of appeals' rule to them need not be considered here.

In any event, we see no reason not to suspend the running of the statute of limitations for a subsequent class action while the question whether the initial class will be certified is unresolved. Refusing to suspend the statute of limitations will encourage the filing of a multiplicity of protective class actions raising the same claims—a burdensome and undesirable result. Moreover, to the extent that class members' individual claims are too small to be litigated except in a class action, refusing to suspend the statute of limitations may leave them without a remedy if the first party to file a class action is determined to be an inadequate representative or not a typical claimant. See *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318,

1450 n.291 (1976). There is no reason to doubt that any dangers of improper manipulation of the limitations period can be averted in the ways we have described, or if necessary by disciplining attorneys who attempt to engage in unethical practices. Notably, we know of no evidence that *American Pipe* has given rise to widespread abuses.[10]

2. In several respects, the court of appeals' approach is particularly appropriate in Title VII cases. First, because of the administrative remedies available under Title VII, a defendant will ordinarily have notice of a claim well before any suit is filed. Respondent, for example, filed an administrative charge, which was served on petitioner, within 180 days of the alleged discriminatory acts. See 42 U.S.C. 2000e-5(e). Thus, by the time respondent filed his individual action, petitioner had already received notice—shortly after the transactions in question—that its actions toward respondent were being challenged, and had had an opportunity to preserve evidence. Surely if this notification of a specific claimant's grievance is followed by the timely filing of a class action that includes that grievance, a defendant will be fully aware of the need to prepare for litigation of the individual's claim. Before any Title VII action is brought, potential defendants will receive comparable notice through the administrative process. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Wheeler* v. *American Home Products*

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[10] Amicus also suggests (EEAC Am. Br. 21) that a claimant might bring a separate action to escape the effect of adverse rulings rendered in the asserted class action. It is unclear how a ruling could bind a class member who is not a named party before the class is certified and the member has had an opportunity to opt out; but if a party were bound by such a ruling, he would presumably be bound, by virtue of collateral estoppel, in a separate action as well.

Corp., 563 F.2d 1233, 1239 (5th Cir. 1977); *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968).

Second, the 90-day period within which a Title VII suit must be filed is quite short. Under the *American Pipe* rule and the court of appeals' approach, the filing of a class action merely suspends the statute of limitations, which begins to run again when certification is denied; consequently, an asserted class member's separate Title VII suit must be filed no more than 90 days after class certification is denied. For this reason, there is no danger that the limitations period will extend so far beyond the conclusion of the class action that the defendant may be lulled into believing that it no longer need protect against litigation of the individual's claim. Cf. *Arneil* v. *Ramsey*, 550 F.2d 774, 783 (2d Cir. 1977).

3. Petitioner urges, however, that the 90-day limitations period of Title VII is a "jurisdictional prerequisite" (Pet. Br. 24), and therefore cannot be suspended by the filing of a class action. This argument cannot be reconciled with the Court's disposition of *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 811 & n.9 (1980). The Court specifically noted that the Title VII action in *Mohasco* was filed 91 days after the Commission issued a right to sue letter to the plaintiff, but the Court did not order the action dismissed for want of jurisdiction; instead, it simply remarked that the defendant "did not assert [the plaintiff's] failure to file the action within 90 days as a defense." This treats the 90-day period as an ordinary statute of limitations and is inconsistent with petitioner's contention that it is a jurisdictional limit.

Moreover, in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the court held that the 180-day period within which a party must file a charge with the Commission (see 42 U.S.C. 2000e-5(e)) is not jurisdictional. 455 U.S. at 392-398. The Court cited the treatment of the untimely filing in *Mohasco* as support for

its conclusion, describing the 90-day period as "a related Title VII time provision" and suggesting that similar principles should govern both limitations provisions. See 455 U.S. at 398. Petitioner suggests no reason for treating the two limitations periods differently. And as petitioner acknowledges (Pet. Br. 25 n.10), every court of appeals that has considered the issue since *Zipes* has agreed that the 90-day period is not jurisdictional. See *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992, 1000-1010 (11th Cir. 1982); *Whatley* v. *Department of Education*, 673 F.2d 873, 879 n.5 (5th Cir. 1982); *Rice* v. *New England College*, 676 F.2d 9, 10 (1st Cir. 1982); *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).[11]

The 90-day period is a limitation on the time within which a suit may be filed, and statutes defining such limitations are traditionally subject to equitable tolling; the Court so noted in *American Pipe* itself, where it rejected an argument similar to petitioner's. See 414 U.S. at 556-559. See also *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 234-235 (1959). Petitioner cites no example of a limitation on the period within which a complaint may be filed that has been treated as jurisdictional.[12] Moreover, the 90-day period

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[11] Petitioner asserts (Pet. Br. 24-25) that the Court has referred to the 90-day period as a jurisdictional limitation. See *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). But these are precisely the statements that the Court discounted in *Zipes*, noting that "the legal character of the requirement was not at issue in those cases" (455 U.S. at 393 n.6, 395).

[12] Contrary to petitioner (Pet. Br. 26), the filing of a Title VII complaint is in no sense comparable to an appeal, as the Court has made clear. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). The Commission does not adjudicate

specified by Title VII is not expressly made a condition of a district court's jurisdiction; the limitations provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" (*Zipes*, *supra*, 455 U.S. at 394), and the jurisdictional provisions "contain[] no reference to" the limitations period (*id.* at 393-394). Compare 42 U.S.C. 2000e-5(f)(1) with 42 U.S.C. 2000e-5(f)(3).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Equal Employment Opportunity Commission

FEBRUARY 1983

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the rights of parties, and the district court does not review its determinations. Accordingly, the 90-day period is not analogous to the period allowed for the filing of a notice of appeal after a judgment has been entered that finally determines the parties' rights. See *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 264 (1978), quoting *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943). And, in contrast to the provisions at issue here, the statute and rule specifying the time for filing a notice of appeal are by their terms mandatory. See 28 U.S.C. 2107; Fed. R. App. P. 4(b).

No. 82-118-CFX
Status: GRANTED

Title: Crown, Cork & Seal Company, Inc., Petitioner
v.
Theodore Parker

Docketed:
July 21, 1982

Court: United States Court of Appeals
for the Fourth Circuit

See also:
82-650

Counsel for petitioner: Magid, Richard J.

Counsel for respondent: Ramsey, Norris Carlton

Entry	Date	Note	Proceedings and Orders
1	Jul 21 1982	G	Petition for writ of certiorari filed.
2	Jul 26 1982		Petitioners letter in compliance with Rule 28.1 filed.
3	Aug 25 1982		DISTRIBUTED. September 27, 1982
4	Aug 31 1982	X	Supplemental brief of petitioner Crown, Cork & Seal Co. filed.
5	Sep 7 1982	P	Response requested. (Due October 7, 1982 - NONE RECEIVED)
6	Oct 13 1982		Brief of respondent Theodore Parker in opposition filed.
7	Oct 20 1982		DISTRIBUTED. November 5, 1982
8	Nov 8 1982		Petition GRANTED.
			**********
9	Dec 22 1982		Brief of petitioner Crown, Cork & Seal Co. filed.
10	Dec 22 1982		Joint appendix filed.
11	Dec 23 1982	G	Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae filed.
12	Jan 10 1983		Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae GRANTED.
13	Jan 18 1983		Brief amicus curiae of Jack Williams and Jerry Powell filed.
15	Jan 20 1983		Order extending time to file brief of respondent on the merits until February 4, 1983.
16	Feb 4 1983		Brief of respondent Theodore Parker filed.
17	Feb 4 1983		Brief amicus curiae of E.E.O.C. filed.
18	Feb 15 1983	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Feb 24 1983		Opposition of petitioner to motion of the Solicitor General for leave to participate in oral filed.
20	Mar 7 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
21	Mar 7 1983		Record filed.
22	Mar 7 1983		Certified original record & C.A. proceedings, 3 volumes received.
23	Mar 11 1983		CIRCULATED.
24	Mar 24 1983		SET FOR ARGUMENT. Monday, April 18, 1983. (1st case) 1 hour
25	Apr 18 1983		ARGUED.